Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

MARY PAMELA BESSER AND
RICHARD GREEN,

Petitioners,

v.

KENNETH E. HARDY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth Circuit correctly held—in conflict with the rule in the Third, Fourth, and Fifth Circuits—that First Amendment protection extends to a state college instructor's classroom speech when the instructor is speaking as an employee of the college.

PARTIES TO THE PROCEEDINGS

Petitioners Mary Pamela Besser and Richard Green were defendants in the District Court and appellants before the United States Court of Appeals for the Sixth Circuit. Besser was Acting Dean and Green was President of Jefferson Community College ("JCC") at the time of the events at issue. JCC and the Kentucky Community and Technical College System were also defendants in the District Court.

Respondent Kenneth Hardy was plaintiff before the District Court and appellee before the United States Court of Appeals for the Sixth Circuit.

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J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 Yale L.J. 251 (1989) 18-19

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Other Authorities:

Gregory A. Clarick, Note, *Public School Teachers and the First Amendment: Protecting the Right to Teach*, 65 N.Y.U. L. Rev. 693 (1990) 6

Karen C. Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J.L. & Educ. 1 (2001) 18, 19

Rachel E. Fugati, Comment, *Choppy Waters Are Forecast for Academic Free Speech*, 26 Fla. St. U.L. Rev. 187 (1998) 18

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PETITION FOR A WRIT OF CERTIORARI

Mary Pamela Besser and Richard Green respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Sixth Circuit is reported at 260 F.3d 671 and reprinted in the appendix hereto ("App.") at 1a. The opinion of the District Court addressing the First Amendment issue is not reported and is reprinted at App. 21a.

JURISDICTION

The judgment of the Sixth Circuit was entered on August 15, 2001. App. 1a. A timely petition for rehearing and rehearing en banc was denied on October 4, 2001. *Id.* 41a-42a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part: "Congress shall make no law * * * abridging the freedom of speech * * * ."

Section 1983 of Title 42, United States Code, provides, in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress * * * ."

INTRODUCTION

This petition asks the Court to resolve a deepening conflict among the courts of appeals respecting the First Amendment protection afforded to classroom speech by publicly employed teachers. Kenneth Hardy alleges that his teaching contract was not renewed because of his pedagogical use of offensive language and that the non-renewal therefore violated the First Amendment. The Sixth Circuit evaluated Hardy's claim under the balancing test set forth in *Connick* v. *Myers*, 461 U.S. 138 (1983) and *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), and held that Hardy's classroom use of offensive language touched on a matter of public concern and merited First Amendment protection.

The Sixth Circuit's holding conflicts with the holdings of other courts of appeals that foreclose First Amendment protection for a teacher's classroom speech when that speech is related to the teacher's employment responsibilities. These cases hold that teachers acting in their professorial capacity do not speak as private citizens but rather as public employees, *see, e.g.*, *Urofsky* v. *Gilmore*, 216 F.3d 401, 409 (4th Cir. 2000) (en banc), *cert. denied*, 531 U.S. 1070 (2001), that the First Amendment does not grant individual teachers control over the curriculum, *see, e.g.*, *Edwards* v. *California Univ. of Pa.*, 156 F.3d 488, 491-492 (3d Cir. 1998), *cert. denied*, 525 U.S. 1143 (1999), and that "academic freedom"—insofar as it exists as a distinct First Amendment category—defines protections afforded to educational institutions, rather than to their employees. *Urofsky*, 216 F.3d at 414-415.

The circuit courts themselves have expressly acknowledged the conflict. *See, e.g.*, *Cockrel* v. *Shelby County Sch. Dist.*, 270 F.3d 1036, 1050-52 (6th Cir. 2001) (criticizing and declining to follow Fourth and Fifth Circuit holdings); *California Teachers Ass'n* v. *State Bd. of Educ.*, 271 F.3d 1141, 1148-49 & n.6 (9th Cir. 2001) (noting "different tests" employed by circuit courts and that "[n]either this court nor the Supreme Court has definitively resolved whether and to what extent a teacher's instructional speech is protected by the First Amendment"). The proliferation of approaches to the issue of classroom speech is provoking increasing confusion in the courts of appeals. *See Vega* v. *Miller*, ___ F.3d ___, 2001 WL 1518273, at *7 (2d Cir. Nov. 29, 2001) (in light of conflicting precedents, concluding that termination of teacher who permitted students to shout vulgarities during classroom exercise did "not violat[e] his clearly established First Amendment academic freedom rights"). This Court should resolve the Question Presented to ensure uniform application of the First Amendment throughout the Nation.

STATEMENT OF THE CASE

Kenneth Hardy joined the faculty of Jefferson Community College ("JCC") in January 1995 as an adjunct instructor in the communications program. Between January 1995 and May 1998, the college renewed Hardy's contract each semester. Hardy alleges that he was told in May 1998 that he would be assigned classes in the fall semester, but he did not sign a contract at that time. App. 2a-3a.

During the summer semester of 1998, Hardy conducted a class on language and social constructivism in his "Introduction to Interpersonal Communication" course. The session's purpose was to examine the use of language in marginalizing certain social groups. The class discussed a variety of words suggested by the students, including "girl," "lady," "faggot," "nigger," and "bitch." *Id.* 3a.

One of Hardy's female African-American students objected to the in-class use of the words "nigger" and "bitch" and complained to both Hardy and JCC officials. She believed that the exercise contradicted the policy set forth in the course syllabus, that "[i]n order to make all class members comfortable enough to participate, there will be no abusive (i.e. sexist, racist, otherwise derogatory) language in discussion." *Id.* Shortly after the student registered her complaint, Reverend Louis Coleman, a local civil rights activist, met with College President Richard Green to discuss the matter and request corrective action. *Id.* 3a-4a. On July 21, 1998, Hardy met with Acting Dean Mary Pamela Besser, who questioned his use of the word "nigger" in class and told Hardy about Reverend Coleman's concern. *Id.* 4a. On August 23, Hardy was informed by mail that the matter had been satisfactorily resolved. Hardy finished teaching the summer session, but was advised in late August that there were no classes for him to teach in the Fall 1998 semester. He has not since been invited back to teach at JCC. *Id.* 4a-5a.

On July 23, 1999, Hardy filed a complaint that asserted state and federal claims against JCC, the Kentucky Community and Technical College System, Besser, and Green. Hardy charged that Besser and Green had retaliated against him for exercising his rights of "free speech and academic freedom," thus violating 42 U.S.C. § 1983 by depriving him of his rights under the First and Fourteenth Amendments. *Id.* 5a. Besser and Green sought dismissal on qualified immunity grounds, contending that the First Amendment did not protect Hardy's use of vulgarity in the classroom, and that in any event such a right was not clearly established. The District Court denied the motion, holding that Hardy had alleged facts stating a First Amendment retaliation claim. *Id.* 26a-27a.

Under the test set forth in *Connick* v. *Myers*, 461 U.S. 138 (1983) and *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), a public employee wishing to state a First Amendment retaliation claim must demonstrate that he was disciplined for speech directed to a matter of public concern and that his interest in speaking outweighed the state's interest in promoting the efficiency of its services. *Pickering*, 391 U.S. at 568. The District Court held that Hardy's use of epithets in an "academic context and setting" qualified under this test as protected speech that touched on a matter of public concern. App. 26a. In the absence of a developed factual record, the court did not proceed to the second prong and balance Hardy's First Amendment interest against JCC's efficiency interests. The court further concluded that Besser and Green were not entitled to qualified immunity because "the right of public employees to comment on matters of public concern has been clearly established by Supreme Court precedent for many years." *Id.* 27a.[1]

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[1] Hardy also asserted Section 1983 claims against JCC, the Kentucky Community and Technical College System, and Besser and Green in their official capacities. These claims were initially deferred by the District Court, but ultimately dismissed on Elev-

Besser and Green appealed the denial of qualified immunity, *see Mitchell* v. *Forsyth*, 472 U.S. 511, 530 (1985), and the Sixth Circuit affirmed. On the threshold matter of whether Hardy's use of offensive language was entitled to First Amendment protection, the Sixth Circuit held that Hardy could state a First Amendment retaliation claim for classroom speech made while teaching on JCC's behalf. Citing a student law review note, the court declared that "[b]ecause the essence of a teacher's role is to prepare students for their place in society as responsible citizens, classroom instruction will often fall within the Supreme Court's broad conception of 'public concern.' " App. 11a-12a (citing Gregory A. Clarick, Note, *Public School Teachers and the First Amendment: Protecting the Right to Teach*, 65 N.Y.U. L. Rev. 693, 702 (1990)). The court distinguished two Sixth Circuit precedents that had denied First Amendment protection to instructors, noting that those cases involved speech that was not germane to the subject matter of a course. *Id.* 10a-11a (distinguishing *Bonnell* v. *Lorenzo*, 241 F.3d 800 (6th Cir.), *cert. denied*, 122 S. Ct. 347 (2001) and *Dambrot* v. *Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995)). Having concluded that classroom instruction may be protected under the First Amendment, the court determined that Hardy's lecture on social deconstructivism and language, though not "pure public debate," sufficiently related to matters of public concern to trigger the *Pickering* balancing test. *Id.* 12a.

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enth Amendment grounds, save for Hardy's claims for prospective injunctive relief. App. 33a. The District Court also rejected Hardy's claims that the non-renewal of his contract violated his rights to due process and equal protection. *Id.* 25a, 27a.

The District Court dismissed Hardy's state law claims of defamation, tortious interference with contractual relationship, and breach of contract. *Id.* 28a-29a, 33a. Hardy's state law conspiracy claim remains alive based on the survival of his First Amendment retaliation count. *Id.* 28a.

The Sixth Circuit's treatment of Hardy's purported right to "academic freedom" confirmed the court's ruling that the First Amendment protected the teacher in the performance of his employment responsibilities. Although the panel raised the issue of academic freedom in its discussion of the second prong of the *Pickering* inquiry, *id.* 13a ("In balancing the competing interests involved, we must take into account the robust tradition of academic freedom in our nation's post-secondary schools."), it employed the concept to address the threshold question of whether Hardy's speech was eligible for First Amendment protection even though he spoke as a JCC employee while in the classroom. After quoting several of this Court's precedents discussing academic freedom, the court declared that

> In light of these precedents, the argument that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction, is totally unpersuasive. * * * This circuit, following Supreme Court direction, has similarly held that a teacher's in-class speech deserves constitutional protection. [*Id.* 13a-14a.[2]]

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[2] The court went on to rule that Besser and Green could not claim qualified immunity because Hardy not only had a First Amendment right but that right was clearly established. Operating at a high level of generality, the court declared that

> [t]here is no doubt that the right allegedly violated in this case, based on the freedom of speech protected by the First Amendment, is one of our most fundamental and established constitutional rights. For decades it has been clearly established that the First Amendment tolerates neither laws nor other means of coercion, persuasion, or intimidation that "cast a pall of orthodoxy" over the free exchange of ideas in the classroom. [App. 17a (quoting *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967)).]

For the proposition that Hardy's First Amendment right was clearly established, the panel relied on *Dambrot* v. *Central*

Green and Besser filed a timely petition for rehearing and rehearing en banc, which was denied on October 4, 2001. App. 41a-42a.

REASONS FOR GRANTING THE WRIT

I. THE COURTS OF APPEALS ARE DIVIDED ON THE IMPORTANT AND RECURRING QUESTION OF WHETHER A TEACHER'S CLASSROOM SPEECH IS PROTECTED BY THE FIRST AMENDMENT

The Sixth Circuit's decision exacerbates a persistent conflict among the circuits as to whether the First Amendment protects a teacher's classroom speech. On the one hand, the Third, Fourth, and Fifth Circuits have held that, under *Pickering*, public educational institutions reserve their right as employers to control the speech of teachers when they act as public employees—i.e., when their speech is related to the subject matter of their class. *See, e.g.*, *Urofsky* v. *Gilmore*, 216 F.3d at 407; *Edwards* v. *California Univ. of Pa.*, 156 F.3d at 491; *Bradley* v. *Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990); *Kirkland* v. *Northside Indep. Sch. Dist.*, 890 F.2d 794, 798-799 (5th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990).

This Court captured the essence of the approach of these circuits in *Rosenberger* v. *Rector & Visitors of University of*

Michigan University, *supra*—a case *denying* First Amendment protection for offensive speech. The panel held that *Dambrot* nonetheless clearly established Hardy's right because it distinguished two Second Circuit cases that involved racially derogatory statements by college professors that were intended to influence public debate. App. 18a-19a. The court below did not address the fact that the Second Circuit cases involved *out-of-class* statements by the professors. *Dambrot*, 55 F.3d at 1189 (discussing *Levin* v. *Harleston*, 966 F.2d 85 (2d Cir. 1992); *Jeffries* v. *Harleston*, 21 F.3d 1238 (2d Cir.), *vacated and remanded*, 513 U.S. 996 (1994)).

Virginia, 515 U.S. 819, 833 (1995), explaining that "when the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker * * * ." Thus, if the teacher's speech relates to his job as an instructor, it is speech the university may control. This view is also followed by other circuits, *see infra* Part I.C., but these courts have added to the confusion in the law by analyzing the issues under the standards set forth in *Hazelwood School District* v. *Kuhlmeier*, 484 U.S. 260 (1988), rather than those set forth in *Pickering*.

The court below took an opposite approach. It found the First Amendment implicated precisely *because* Hardy's offensive speech was "germane to the subject matter" of his class. App. 11a. Because Hardy's speech was germane to his topic, which related to matters deemed to touch on public concern, the court held that the first prong of *Pickering* was satisfied and a balancing of competing interests was required. As the court below put it, "[b]ecause the essence of a teacher's role is to prepare students for their place in society as responsible citizens, classroom instruction will often fall within the Supreme Court's broad conception of 'public concern.' " *Id.*

Since the decision below, the Sixth Circuit has explicitly acknowledged that its view that a teacher's classroom speech may touch on a matter of public concern, and therefore trigger First Amendment protection, conflicts with the rule in other circuits. *Cockrel* v. *Shelby County Sch. Dist.*, 270 F.3d at 1051 (criticizing and declining to follow position of "the Fourth and Fifth Circuits * * * that a teacher, in choosing what he will teach his students, is not speaking as a citizen, but rather as an employee on matters of private interest"). The conflict is particularly entrenched because the very same consideration—how closely the teacher's speech is related to

the subject matter of the class—causes some circuits to find First Amendment protection appropriate, while it causes other circuits to reach the opposite conclusion. This case therefore presents a proper candidate for review by this Court. *See* S. Ct. Rule 10; *Braxton* v. *United States*, 500 U.S. 344, 347 (1991) (a "principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals").

A. In the Third, Fourth, and Fifth Circuits, public school teachers do not have a First Amendment right to carry out their classroom duties in a manner contrary to their employers' pedagogical or other objectives. Those circuits look to the teacher's role at the time of the speech at issue, and hold that First Amendment protection is not warranted where the speech is within the scope of the teacher's employment activities. The Fourth Circuit, for example, has ruled that the First Amendment does not apply to a broad range of teacher activities that might well constitute protected speech if undertaken outside of employment. In *Urofsky*, the en banc court rejected a First Amendment challenge by college professors to a Virginia statute that restricted state employees from accessing sexually explicit material on state owned or leased computers. The court held that the speech of a public employee does not touch on a matter of public concern—and therefore does not implicate the First Amendment—if the employee acts on the government's behalf when speaking. "The Supreme Court has made clear that the concern is to maintain for the government employee the same right enjoyed by his privately employed counterpart. To this end, * * * the Court has emphasized the *unrelatedness* of the speech at issue to the speaker's employment duties." 216 F.3d at 407 (emphasis added) (citing *United States* v. *National Treasury Employees Union*, 513 U.S. 454, 465 (1995)).

The Fourth Circuit did not deny that the subject of the speech may be important, but nevertheless acknowledged

"the basic truth that speech by public employees undertaken in the course of their job duties will frequently involve matters of vital concern to the public, without giving those employees a First Amendment right to dictate to the state how they will do their jobs." *Id.* In the Fourth Circuit's view, it is necessary that the state retain control of its employees when they act on the state's behalf because "[i]t cannot be doubted that in order to pursue its legitimate goals effectively, the state must retain the ability to control the manner in which its employees discharge their duties and to direct its employees to undertake the responsibilities of their positions in a specified way." *Id.* at 409. Applying its analysis to the plaintiff professors, the court concluded that they used state computers in their capacity as employees. Accordingly, a statute restricting such use did not run afoul of the First Amendment. *Id.*; *see also Boring* v. *Buncombe County Bd. of Educ.*, 136 F.3d 364, 369 (4th Cir.) (en banc) (holding that because teacher's dispute with administration and school board over contents of publicly performed play involved a curricular matter and was "nothing more than an ordinary employment dispute, it does not constitute protected speech and has no First Amendment protection"), *cert. denied*, 525 U.S. 813 (1998).

The Third Circuit, like the Fourth, finds the First Amendment inapplicable when a teacher's speech relates to his employment duties. *Bradley* v. *Pittsburgh Board of Education*, *supra*, involved a tenured high school teacher's desire to employ a particular teaching methodology, known as "Learnball." The court held that the teacher's academic freedom did not extend to curricular choices or classroom management techniques, and rejected the application of the *Pickering* balancing test to her in-class conduct. "Although a teacher's *out-of-class* conduct, including her advocacy of particular teaching methods is protected, * * * her *in-class* conduct is not." 910 F.2d at 1176 (emphases added). Contrary to the Sixth Circuit's view of the law, under the

Third Circuit's approach it is unnecessary to consider whether the teaching method in question—Learnball in *Bradley*, explicit language here—poses any threat of disruption. The fact that the teacher is acting as an employee rather than as a citizen means that the First Amendment is not implicated.

The Third Circuit has applied the same distinction to a university professor who claimed that restrictions on course materials and class content violated his First Amendment rights. In *Edwards* v. *California University of Pennsylvania*, 156 F.3d at 491, the court "conclude[d] that a public university professor does not have a First Amendment right to decide what will be taught in the classroom." Quoting this Court's explanation in *Rosenberger*, 515 U.S. at 833, that " 'when the State is the speaker, it may make content-based choices,' " the court focused on the capacity of the teacher, explaining that he has fewer rights when acting on the state's behalf. *Edwards*, 156 F.3d at 491. "Since the University's actions in the instant case concerned the 'content of the education it provides,' we find that the University was acting as speaker and was entitled to make content-based choices in restricting [the plaintiff's] syllabus." *Id.* at 492 (citation omitted).

The Fifth Circuit has likewise recognized the distinction between citizen and employee in this context, holding that a teacher's speech implicates the First Amendment only if undertaken in the former role. In *Kirkland* v. *Northside Independent School District*, *supra*, the court rejected a probationary teacher's challenge to the non-renewal of his contract based on his use of a separate reading list. The court explained that the question turned on the capacity in which the plaintiff acted when speaking.

> [I]ssues do not rise to a level of "public concern" by virtue of the speaker's interest in the subject matter; rather, they achieve that protected status if the words or conduct

> are conveyed by the teacher in his *role as a citizen* and not in his *role as an employee* of the school district. [890 F.2d at 798-799 (emphases in original).[3]]

The court concluded that the plaintiff's constitutional claim did not advance beyond the threshold inquiry, determining that his use of a separate reading list was not a matter of public concern. *Id.* at 800.[4]

B. The approach of the Third, Fourth, and Fifth Circuits—emphasizing that the First Amendment is not implicated unless a teacher's speech is *unrelated* to the teacher's duties—is diametrically opposed to the decision below. The Sixth Circuit focused on the pedagogical nature of Hardy's speech, concluding that it was protected under the First

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[3] The court also relied on the circuit's prior ruling in *Terrell* v. *University of Texas System Police*, 792 F.2d 1360 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987), which declared

> Because almost anything that occurs within a public agency *could* be of concern to the public, we do not focus on the inherent interest or importance of the matters discussed by the employee. Rather, our task is to decide whether the speech at issue in a particular case was made primarily in the plaintiff's role as a citizen or primarily in his role as an employee. [*Id.* at 1362 (emphasis in original).]

[4] The Seventh Circuit has likewise distinguished between educators speaking in their role as citizens and as teachers. *Clark* v. *Holmes*, 474 F.2d 928 (7th Cir. 1972) (per curiam), *cert. denied*, 411 U.S. 972 (1973), involved a teacher who had not been rehired based on his counselling of students and his teaching sex education in a health course. The Seventh Circuit rejected the teacher's claim that the action violated his First Amendment rights because "[plaintiff's] disputes with his superiors and colleagues about course content and counselling were not 'matters of public concern' and involved [plaintiff] as a teacher rather than as an interested citizen." *Id.* at 931. The court applied the same reasoning to the teacher's criticisms of his employers in front of the class. *See id.*

Amendment because it related to his employment as an instructor. App. 10a-11a (distinguishing earlier Sixth Circuit precedents because those cases had involved speech that was not germane to the subject matter of a course). Had the Third, Fourth, and Fifth Circuit rule applied below, Hardy could not have stated a claim. He was conducting a class on JCC's behalf as an employee, so his status when speaking would have precluded treating his speech as touching on a matter of public concern. *Contrast Cockrel*, 270 F.3d at 1051-52 (rejecting Fourth and Fifth Circuit holdings and stating Sixth Circuit position that teacher speech may touch on public concern even when teacher is speaking as an employee). Under the Sixth Circuit's view, Hardy's speech warranted First Amendment protection precisely *because* it was related to his employment.

The First and Second Circuits have similarly found that teachers' classroom speech may warrant First Amendment protection (although those circuits, as noted below, appear internally divided on the issue). In those circuits, like the Sixth Circuit, such speech can receive First Amendment protection when it touches on a matter of public concern, notwithstanding that the speech may be contrary to the employer's pedagogical objectives. *See, e.g.*, *Blum* v. *Schlegel*, 18 F.3d 1005, 1011-12 (2d Cir. 1994) (law professor's speech in classes implicated matters of public concern); *Hennessy* v. *City of Melrose*, 194 F.3d 237, 247 (1st Cir. 1999) (student teacher engaged in sufficiently protected expression during school activities to require balancing of interests in evaluating his termination).

There is thus a clear division in authority between the First, Second, and Sixth Circuits, which apply the *Pickering* balancing test to teacher speech in classroom settings, and the Third, Fourth, and Fifth Circuits, which as a threshold matter preclude First Amendment protection for teacher speech that is spoken as part of the teacher's job.

C. The conflict among the circuits is exacerbated by the fact that many circuits—including the Eighth, Tenth, and Eleventh—evaluate First Amendment protection for teacher classroom speech not under the *Pickering* framework but instead under that established by *Hazelwood*, *supra*, which permits editorial control over school-sponsored expression so long as the regulation is reasonably related to legitimate pedagogical concerns. Indeed, as the Sixth Circuit has recognized, the circuits are divided on which framework is appropriate. *See Cockrel*, 270 F.3d at 1055 n.7 ("Rather than apply *Pickering*, several circuits have chosen to apply the Supreme Court's analysis of students' in-class speech rights in *Hazelwood* * * * to cases in which teachers' in-class speech rights are at issue."); *see also California Teachers Ass'n* v. *State Bd. of Educ.*, 271 F.3d at 1149 n.6 (describing "different tests" employed by circuit courts "to analyze the free speech rights of teachers").

The circuits that have applied *Hazelwood* in situations akin to the present case are aligned with the view of the Third, Fourth, and Fifth Circuits that a school has substantial discretion in setting the scope of permitted speech by its employees. They thus stand in sharp contrast to the Sixth Circuit's lack of deference to the college's concern regarding the disruption caused by Hardy's speech. For example, in *Bishop* v. *Aronov*, 926 F.2d 1066 (11th Cir. 1991), *cert. denied*, 505 U.S. 1218 (1992), the court looked to *Hazelwood* to reject a university professor's claim that a directive to refrain from interjecting religious beliefs into class or conducting optional classes to discuss topics from a Christian perspective violated his First Amendment rights. As the court explained, the plaintiff's "interest in academic freedom and free speech do not displace the University's interest inside the classroom." *Id.* at 1076.

The Eighth and Tenth Circuits have also adhered to that view, dismissing First Amendment claims of teachers where (as in this case) the alleged restriction on speech is reasona-

bly related to pedagogical concerns. *See Lacks* v. *Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 724 (8th Cir. 1998) (declaring, in upholding the termination of a teacher who allowed her students to use profanity, that a "flat prohibition on profanity in the classroom is reasonably related to the legitimate pedagogical concern of promoting generally acceptable social standards"), *cert. denied*, 526 U.S. 1012 (1999); *Miles* v. *Denver Pub. Schs.*, 944 F.2d 773, 778-779 (10th Cir. 1991) (upholding, on summary judgment, discipline of teacher for repeating rumor to class concerning students who were "making out" on a tennis court). Meanwhile, decisions of the First and Second Circuits have employed *Hazelwood* to reject First Amendment claims of teachers complaining of restrictions on classroom speech.[5] Thus, the First and Second Circuits are themselves divided on the question, with some decisions of those courts holding that teacher classroom speech can warrant First Amendment protection under *Pickering*, and others dismissing such claims under *Hazelwood*. This multiplicity of views only serves to heighten the confusion in the law.

D. The Sixth Circuit's invocation of "academic freedom" to bolster its ruling that the First Amendment applies to Hardy's speech also reflects a conflict among the circuits. App. 13a-14a; *see also Parate* v. *Isibor*, 868 F.2d 821, 830 (6th Cir. 1989) (observing that academic freedom "protect[s] the individual professor's classroom method from the arbitrary interference of university officials"). Most notably, the Fourth Circuit's en banc holding in *Urofsky* rejected the argument that university professors have the right to deter-

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[5] *See Silano* v. *Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 723 (2d Cir. 1994) (upholding censure of guest lecturer who used depictions of bare-chested women to illustrate phenomenon of persistence of vision), *cert. denied*, 515 U.S. 1160 (1995); *Conward* v. *Cambridge Sch. Comm.*, 171 F.3d 12, 22-23 (1st Cir. 1999) (school could discipline teacher for handing a paper that contained improper language to a student).

mine the subject of their research, writing, or teaching such that they possess greater First Amendment protections than their fellow public employees. The Fourth Circuit extensively examined the historical and precedential background of the notion of academic freedom, *see* 216 F.3d at 409-415, observing that "decisions invoking academic freedom are lacking in consistency and courts often invoke the doctrine in circumstances where it arguably has no application." *Id.* at 410 (citations omitted). Like the *Hardy* panel, the *Urofsky* court focused on this Court's opinions in *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957) and *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967). Contrary to the Sixth Circuit in this case, however, the Fourth Circuit concluded that "[t]he Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an *institutional* right of self-governance in academic affairs." *Id.* at 412 (emphasis added). The conflict between the two circuits is particularly stark, since the Sixth Circuit invoked the concept of academic freedom to override the institution's determination on how to govern academic affairs.

Other recent precedents from the Third, Tenth, and Eleventh Circuits reach the same conclusion as the Fourth Circuit in *Urofsky* and refrain from giving the amorphous concept of academic freedom substance as an *individual* right. *See, e.g.*, *Edwards*, 156 F.3d at 492 (holding that teacher's interest in academic freedom does not trump college's); *Bishop* v. *Aronov*, 926 F.2d at 1075 ("Though we are mindful of the invaluable role academic freedom plays in our public schools * * * we do not find support to conclude that academic freedom is an independent First Amendment right."); *Miles* v. *Denver Pub. Schs.*, 944 F.2d at 779 ("[T]he caselaw does not support [plaintiff's] position that a secondary school teacher has a constitutional right to academic freedom."); *but cf. Burnham* v. *Ianni*, 119 F.3d 668, 680 n.19 (8th Cir. 1997) (en banc) (noting that its holding that the removal of profes-

sors' photos from display violated First Amendment was supported "in some respect" by the professors' academic freedom).

The Sixth Circuit's invocation of academic freedom to support extending constitutional protection to a teacher's classroom speech that is contrary to the pedagogical mission of his employer has thus heightened the circuit conflict. This Court should grant the writ to resolve that persistent conflict and clarify the proper role for considerations of academic freedom in such cases—as support for the teacher's individual claim or instead for the institution's prerogative to define and pursue its educational mission.

E. The circuit conflict on the question presented by this petition is direct and undeniable. It has been expressly acknowledged by the Sixth Circuit, *Cockrel*, 270 F.3d at 1051, and by numerous commentators as well. *See, e.g.*, Karen C. Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J.L. & Educ. 1, 6 (2001) ("The Supreme Court has yet to squarely address what level of protection, if any, should be accorded to teachers' in-class speech. * * * The Supreme Court's abstention has fostered divergent approaches in the lower courts, as well as a general lack of certainty about the parameters of teachers' free speech rights."); Merle H. Weiner, *Dirty Words in the Classroom: Teaching the Limits of the First Amendment*, 66 Tenn. L. Rev. 597, 602 (1999) ("[T]here is currently a split among the circuit courts on the appropriate test for resolving teachers' in-class speech issues"); Rachel E. Fugate, Comment, *Choppy Waters Are Forecast for Academic Free Speech*, 26 Fla. St. U. L. Rev. 187, 203 (1998) ("Lower courts have not developed a consistent test to be applied to a professor's speech in the classroom because the Supreme Court has not addressed the level of protection that such speech demands."); J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 Yale L.J. 251, 252-253 (1989) ("Attempts to understand the scope and

foundation of a constitutional guarantee of academic freedom * * * generally result in paradox or confusion. The cases, shorn of panegyrics, are inconclusive, the promise of their rhetoric reproached by the ambiguous realities of academic life.").

The commentary has observed that the proliferation of approaches in the courts below is tied to the threshold uncertainty raised by this petition—whether the First Amendment applies to an instructor speaking on his school's behalf. "These variations can be collapsed into one major difference that splits the circuits—ultimately each court strikes a different balance in allocating power over educational decision-making between teachers and school administrators." Daly, *supra*, at 17.

The unsettled state of the law is provoking confusion in the district courts.[6] State courts are similarly divided on how to address questions respecting classroom speech by teachers. *Compare LeVake* v. *Independent Sch. Dist. #656*, 625 N.W.2d 502, 508 (Minn. Ct. App. 2001) (rejecting First Amendment claim when "[plaintiff], in his role as a public school teacher rather than as a private citizen, wanted to discuss the criticisms of evolution"), *Green Township Educ. Ass'n* v. *Rowe*, 746 A.2d 499, 505 (N.J. Super. Ct. 2000) (striking down regulation of teacher speech because "its prohibitions are not invariably confined to the setting of the

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[6] *See, e.g.*, *Cohen* v. *San Bernardino Valley College*, 883 F. Supp. 1407, 1414 (C.D. Cal. 1995) (reviewing judicial treatment of academic freedom and concluding that the "parameters of academic freedom are not distinct, particularly in relation to the potential conflict with a university's duty to ensure adequate education of its students"), *rev'd in part on other grounds*, 92 F.3d 968 (9th Cir. 1996), *cert. denied*, 520 U.S. 1140 (1997); *Silva v. University of N.H.*, 888 F. Supp. 293, 314-316 (D.N.H. 1994) (applying *Connick* and *Pickering* to determine that college professor's classroom speech related to matters of public concern while noting uncertainty that test was applicable).

school facility or classroom * * * [or] limited to situations in which students are present," but expressing "no doubt" that regulations applicable "in the presence of students while on school property could pass constitutional muster"), *Board of Educ. of Jefferson County Sch. Dist. R-1* v. *Wilder*, 960 P.2d 695, 702 (Colo. 1998) (en banc) (affirming termination of teacher for showing R-rated film to students as part of curriculum), *and Fisher* v. *Fairbanks North Star Borough Sch. Dist.*, 704 P.2d 213, 217 (Alaska 1985) (holding that control over instructional material rests with school board alone), *with Hosford* v. *School Comm. of Sandwich*, 659 N.E.2d 1178, 1182 (Mass. 1996) (concluding that refusal to rehire special needs teacher based on her pedagogical discussion of meanings of offensive words violated First Amendment), *and DiBona* v. *Matthews*, 269 Cal. Rptr. 882, 893-894 (Ct. App.) (holding First Amendment barred community college's cancellation of drama class based on teacher's intent to perform play containing vulgar language), *cert. denied*, 498 U.S. 998 (1990). Guidance is therefore required from this Court to resolve the extensive uncertainty pervading the lower courts.

II. THE QUESTION PRESENTED IS IMPORTANT AND SHOULD BE DECIDED BY THIS COURT

The conflict among the courts of appeals presented by this petition provides a compelling basis for plenary review, but the need for certiorari is heightened by the importance of the underlying issue. In *Connick*, this Court warned that if all matters within a government office are of public concern, then "virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case." 461 U.S. at 149. The present case poses an analogous risk with respect to the classroom.

The ruling below has immediate repercussions for public schools throughout the Sixth Circuit. Since pedagogical classroom activities often involve speech that could be

argued to touch on areas of public concern, *see Urofsky*, 216 F.3d at 407, disgruntled teachers will more easily be able to transform run-of-the-mill employment disputes involving classroom performance into purported constitutional torts because schools will no longer be allowed an unfettered right to make content choices when acting as a speaker. *Cf. Rosenberger*, 515 U.S. at 833. Instead, they will have to share this right with their employees, for the panel opinion's recognition of an *individual* right to academic freedom is at the expense of the traditionally recognized *institutional* right. *Cf. Piarowski* v. *Illinois Cmty. College Dist. 515*, 759 F.2d 625, 630 (7th Cir.) ("If we hold that the college was forbidden to take the action it took to protect its image, we limit the freedom of the academy to manage its affairs as it chooses."), *cert. denied*, 474 U.S. 1007 (1985).

As a result, litigation burdens for public schools will greatly increase. When employment decisions based on classroom conduct are challenged, schools will be required to build a record to justify their hiring and firing choices against their employees' supposed rights to free expression in discharging their classroom duties. By broadening the range of cases that require a balancing of interests, the ruling below inevitably invites increasing judicial involvement into quotidian personnel management decisions by public institutions. Such interference stands to retard the political processes through which public oversight of educational institutions is normally maintained. *See Board of Regents of Univ. of Wis. Sys.* v. *Southworth*, 529 U.S. 217, 235 (2000) ("When the government speaks * * * it is, in the end, accountable to the electorate and the political processes for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.").

The *Pickering* framework is designed to minimize such intrusions. This Court has always recognized the importance of according government entities considerable latitude in controlling the workplace. "[T]he Government, as an em-

ployer, must have wide discretion and control over the management of its personnel and internal affairs." *Connick*, 461 U.S. at 151 (quoting *Arnett* v. *Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring)); *see also Pickering*, 391 U.S. at 568 ("[I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.").

Accordingly, this Court distinguishes between citizen speech that addresses a matter of public concern and employee speech that does not.

> The repeated emphasis in *Pickering* on the right of a public employee "as a citizen in commenting upon matters of public concern," was not accidental. This language, reiterated in all of *Pickering*'s progeny, reflects both the historical evolvement of rights in public employees, and the common sense realization that government offices could not function if every employment decision became a constitutional matter. [*Connick*, 461 U.S. at 143 (footnotes omitted).]

The panel opinion disturbs this balance by treating expression that is clearly employee speech as touching on a matter of public concern. Lecturing students and conducting class discussion are the very essence of employment as an instructor at JCC or any other educational institution. *See also Cockrel*, 270 F.3d at 1052 ("[A]lthough plaintiff was speaking in her role as an employee when presenting information on the environmental benefits of industrial hemp, the content of her speech * * * most certainly involved matters related to the political and social concern of the community, as opposed to mere matters of private interest.").

The facts of this case are thus in stark contrast to those that motivated this Court to extend First Amendment protections to a teacher's letter to a local newspaper in *Pickering*. As the

Court took pains to explain, the letter was unrelated to the teacher's coworkers, his daily duties, or the school's operation. *Pickering*, 391 U.S. at 569-570, 572-573. In contrast, when the speech in question directly implicates a teacher's duties, as here, the school's regulatory interest is at its zenith. Nonetheless, under the Sixth Circuit's approach, a public institution's evaluation of such expression is subject to judicial second-guessing.

The Sixth Circuit sharply reduced the flexibility enjoyed by public employers to regulate those who speak on their behalf. To do so, the court employed reasoning that is directly contrary to decisions by other courts of appeals. And, as demonstrated by the plethora of reported opinions on this issue in virtually every circuit, the question presented is a recurring one that will not disappear. This Court should grant certiorari to harmonize the lower courts' treatment of the important issue presented by the petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 00-5198

KENNETH E. HARDY,
Plaintiff-Appellee,

v.

JEFFERSON COMMUNITY COLLEGE AND KENTUCKY COMMUNITY AND TECHNICAL COLLEGE SYSTEM,
Defendants,

MARY PAMELA BESSER AND RICHARD GREEN,
Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Kentucky at Louisville.
No. 99-00477--Charles R. Simpson III,
Chief District Judge.

Argued: June 8, 2001
Decided and Filed: August 15, 2001

Before: KEITH, NORRIS, and GILMAN, Circuit Judges.

OPINION

RONALD LEE GILMAN, Circuit Judge. Kenneth E. Hardy, a Caucasian adjunct instructor at Jefferson Community College, brought suit against the College, Kentucky Community and Technical College System, College President Richard Green, and former Acting Dean Mary Pamela Besser pursuant to 42 U.S.C. § 1983, alleging that the defendants retaliated against him for exercising his constitutionally protected right of free speech. Following a classroom discussion examining the impact of such oppressive and disparaging words as "nigger" and "bitch," one of Hardy's African-American students complained to her minister, a local civil-rights activist. When the minister threatened that African-American enrollment would decline unless the dispute was resolved to the satisfaction of the complaining student, Hardy's teaching contract was not renewed.

The district court dismissed all of Hardy's claims against the College, as well as against Green and Besser in their official capacities, but rejected Green's and Besser's contention that they were entitled to qualified immunity in their individual capacities as a matter of law. Green and Besser now challenge that decision on interlocutory appeal. For the reasons set forth below, we **AFFIRM** the judgment of the district court and **REMAND** the case for further proceedings consistent with this opinion.

I. BACKGROUND

A. Factual background

In January of 1995, Jefferson Community College hired Hardy as an adjunct instructor to teach in its communications program. He was responsible for two courses, Basic Public Speaking and Introduction to Interpersonal Communication. The College continued to renew Hardy's teaching contract each semester thereafter. He received consistently

outstanding student evaluations and strong reviews from his superiors. In May of 1998, Hardy was informed that he would be assigned three sections during the upcoming fall semester, although he was not asked to sign a contract at that time.

During the summer semester of 1998, he was again teaching Introduction to Interpersonal Communication. His twenty-two students included nine African-Americans, one of Asian descent, and a foreign exchange student from Switzerland. On July 16, he presented his standard lecture on language and social constructivism, where the students examined how language is used to marginalize minorities and other oppressed groups in society. The lecture included a discussion and analysis of words that have historically served the interests of the dominant culture in which they arise. Hardy solicited from his students examples of such terms. Among their suggestions were the words "girl," "lady," "faggot," "nigger," and "bitch." According to Hardy and other members of the class, the discussion was academically and philosophically challenging. Almost every student participated in the exercise.

One African-American student, however, objected to the in-class use of the words "nigger" and "bitch," and complained to Hardy and his superiors. The student found the exercise to be in direct contravention of Hardy's stated policy prohibiting the use of offensive language in class. This policy was set forth in the written syllabus that Hardy distributed on the first day of class, which read in pertinent part as follows: "In order to make all class members comfortable enough to participate, there will be no abusive (i.e. sexist, racist, otherwise derogatory) language in discussion."

Although Hardy apologized to the complaining student for any discomfort that the class had caused her, the student contacted Reverend Louis Coleman, a local civil-rights

activist, to voice her objection to the gender and racial slurs used in the class. Coleman, in turn, arranged a meeting with College President Green and the student to make Green aware of the student's complaint and to ask that "corrective action be taken." During the meeting, Coleman informed Green that he would not "allow our kids to come to an institution and be berated with the 'N' word and the 'B' word."

On July 21, 1998, former Acting Dean Besser met with Hardy to discuss the student's concerns. She specifically asked why the word "nigger" was used in class when his syllabus forbade such racist or derogatory language. Although Hardy attempted to explain that this and other words were analyzed as illustrations of highly offensive, powerful language, and that it was not used in an "abusive" manner, Besser continued to challenge Hardy regarding the classroom discussion. Hardy then asked Besser if there was anything he could do to rectify the situation. Rather than responding to his question, she informed him that a "prominent citizen" representing the interests of the African-American community had become involved and had threatened to affect the school's already-declining enrollment if corrective action was not taken.

Hardy finished teaching the course as scheduled in the summer semester. On August 23, 1998, Dr. Denise Gray, the Assistant Dean of Students for the College, wrote Hardy to inform him that the matter had been resolved to the satisfaction of the complaining student. Around the same time, Besser left a message on Hardy's home answering machine stating that "there were no classes" for him to teach in the Fall 1998 semester.

At Hardy's request, Green and Besser met with Hardy to discuss the issue in early September of 1998. They informed him that the matter had been resolved to the stu-

dent's satisfaction, but they declined to elaborate further. Hardy was never again asked to teach at the College.

B. Procedural background

On July 23, 1999, Hardy filed suit pursuant to 42 U.S.C. § 1983, alleging that the defendants had violated his rights under the First and Fourteenth Amendments to the United States Constitution. Hardy's complaint contended that the defendants had retaliated against him for exercising his rights of free speech and academic freedom. He also asserted several state-law causes of action, including defamation, conspiracy, breach of contract, and tortious interference with his and the College's continuing business relationship.

The defendants filed a timely motion to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, asserting various grounds for dismissal. First, the College, as well as Green and Besser in their official capacities, argued that Hardy's claims were barred by the Eleventh Amendment to the United States Constitution and by sovereign immunity as provided in Section 231 of the Kentucky Constitution. Because the College is an arm of the state of Kentucky, and because any judgment against either the College or Green and Besser in their official capacities would be paid out of the state treasury, the district court granted this portion of the defendants' motions, excepting only those claims praying solely for prospective injunctive relief.

Second, Green and Besser claimed that they were entitled to qualified immunity in their individual capacities because Hardy had no constitutional right to use the "N" word and the "B" word, and that they had the right to terminate him for using such language. The district court denied their motion, holding that Hardy's speech touched upon "a matter of public concern" and that a public employee's right to

speak on such matters has been clearly established by the Supreme Court. In a related ruling, the court denied the defendants' motion to dismiss Hardy's state-law conspiracy claim. Despite their argument that he had failed to allege any unlawful act that would support a conspiracy claim, the court held that, if Hardy could show that they had retaliated against him for exercising his constitutional rights, he would satisfy the state-law conspiracy requirement.

Finally, the district court determined that Hardy had failed to plead sufficient facts to support his Fourteenth Amendment equal-protection and procedural-due-process claims, or his state-law claims of defamation, tortious interference with a contractual relationship, and breach of contract. It therefore granted the defendants' motion to dismiss all of these latter claims.

Green and Besser then filed a motion to alter or amend the district court's ruling that they were not entitled to qualified immunity, asserting that "the right to free speech *in the classroom setting* is not clearly established." (Emphasis in original.) Again the district court denied their motion, finding the argument "to be a distinction without a difference." The court also denied Green's and Besser's motion to reconsider its ruling on Hardy's state-law conspiracy claim. Green and Besser have filed this interlocutory appeal to challenge the district court's denial of their qualified-immunity defense.

II. JURISDICTION

Under 28 U.S.C. § 1291, this court has jurisdiction to hear appeals from "final decisions" of the district court. As the Supreme Court has explained, however, "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." *Mitchell v. Forsyth*, 472 U.S.

511, 530 (1985). The Court emphasized, however, that appellate jurisdiction over these interlocutory appeals is confined to the "purely legal" question of "whether the facts alleged . . . support a claim of violation of clearly established law." *Id.* at 528 n.9. We therefore have jurisdiction over Green's and Besser's appeal so long as our review is confined to the "purely legal" question of whether the facts as alleged by Hardy show a violation of his clearly established rights.

III. ANALYSIS

A. Standard of review

The doctrine of qualified immunity shields government officials from liability, as well as from suit, so long as their official conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A district court must engage in a two-step inquiry when determining whether a state actor is entitled to qualified immunity. First, the court must ask whether the plaintiff in the civil action has demonstrated the violation of a constitutionally protected right. Green and Besser question whether Hardy's use of "racially derogatory and sexist language" in the classroom constituted speech protected by the First Amendment, thereby raising a question of law properly reviewable on interlocutory appeal. *See Johnson v. Jones*, 515 U.S. 304, 317 (1995) (holding that the denial of qualified immunity is reviewable on interlocutory appeal only if the case presents "abstract issues of law"). Second, the court must examine "whether the right is so 'clearly established' that a reasonable official would understand that what he is doing violates that right." *Brennan v. Township of Northville*, 78 F.3d 1152, 1154 (6th Cir. 1996) (citation omitted).

Although qualified immunity is typically addressed at the summary judgment stage of the case, the defense may be raised and considered on a motion to dismiss. The motion will be granted if the complaint fails to allege the violation of a clearly established constitutional right. *See Stemler v. City of Florence*, 126 F.3d 856, 866-67 (6th Cir. 1997). Whether the complaint alleges such a violation is a question of law which we review *de novo*, accepting the facts alleged in the complaint as true and drawing all reasonable inferences therefrom in the plaintiff's favor. *See Spurlock v. Satterfield*, 167 F.3d 995, 1000 (6th Cir. 1999).

B. The district court did not err in denying Green's and Besser's motion to dismiss on the basis of qualified immunity

In this appeal, Green and Besser raise two different issues for our review. First, they challenge the district court's holding that Hardy's in-class speech involved a matter of public concern, thus falling within the protections of the First Amendment. Second, they contend that reasonable officials could have disagreed on whether, and to what extent, Hardy's speech was constitutionally protected.

Green and Besser also maintain that Hardy's contract was not renewed because of his objectionable teaching methods, and that this case therefore involves nothing more than an internal employment dispute. In order for this court to retain jurisdiction, however, Green and Besser "must be prepared to overlook any factual dispute and to concede an interpretation of the facts in the light most favorable to [Hardy's] case." *Berryman v. Rieger*, 150 F.3d 561, 562 (6th Cir. 1998). The facts as alleged by Hardy directly contravene this attempt to characterize the matter as "nothing more than an ordinary employment dispute." At the July 1998 meeting between Besser and Hardy, Besser questioned Hardy at length about the usage of the "N" word in his classroom discussion. Besser also allegedly informed

Hardy that if he "were not a white male, this would not be an issue." As such, we will not consider Green's and Besser's disputed version of the material facts in our analysis.

1. First Amendment retaliation claim

Hardy alleges that Green and Besser violated his First Amendment right to freedom of speech when they failed to renew his contract in retaliation for his in-class discussion of "socially controversial words." The district court found that the use of the racial and gender epithets in an academic context, designed to analyze the impact of these words upon societal relations, touched upon a matter of public concern and thus fell within the First Amendment's protection. Green and Besser contend, however, that Hardy's use of "racially vulgar words" presented no issue of public concern and therefore enjoyed no constitutional protection.

The Supreme Court has long held that a public employee retains his First Amendment right to comment on matters of public concern without fear of reprisal from the government as his employer. *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968) (holding that a teacher's comments concerning school funding issues touched upon a matter of public concern and could not provide the basis for dismissal). Furthermore, an employee's untenured status will not defeat constitutional claims. *See Perry v. Sindermann*, 408 U.S. 593, 597-98 (1972) (declaring that a professor's lack of tenure did not defeat the claim that the nonrenewal of his contract was in retaliation for the exercise of his constitutional right to free speech). A public employee may "establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms." *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84 (1977).

As a public employee, Hardy must show that (1) he was disciplined for speech that was directed toward an issue of public concern, and (2) his interest in speaking as he did outweighed the College's interest in regulating his speech. *See Pickering*, 391 U.S. at 568.

In *Connick v. Myers*, 461 U.S. 138 (1983), the Supreme Court determined that the question of whether a public employee's speech is constitutionally protected turns upon the "public" or "private" nature of such speech. The distinction is based upon the principle that "speech on public issues occupies the highest rung of the heirarchy [sic] of First Amendment values, and is entitled to special protection." *Id.* at 145 (internal citation and quotation marks omitted).

To determine whether an employee's speech addresses a matter of public concern, the court must look to the "content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48. Speech that relates "to any matter of political, social, or other concern to the community" touches upon matters of public concern. *Id.* at 146. Furthermore, the court must determine "the *point* of the speech in question . . . [because] [c]ontroversial parts of speech advancing only private interests do not necessarily invoke First Amendment protection." *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1187 (6th Cir. 1995) (emphasis in original) (internal quotation and citation omitted).

Relying on this court's recent decision in *Bonnell v. Lorenzo*, 241 F.3d 800 (6th Cir. 2001), Green and Besser argue that Hardy's use of "racially vulgar words" failed to touch upon a matter of public concern, and therefore was not entitled to protection under the First Amendment. The college professor in *Bonnell*, however, was disciplined for his gratuitous in-class use of the words "pussy," "cunt," and "fuck," which had given rise to a sexual harassment complaint filed by one of the professor's students. *Id.* at 803.

Because Bonnell's offensive language was "not germane to the subject matter," the court concluded that he did "not have a constitutional right to use [these terms] in a classroom setting." *Id.* at 820. Unlike Bonnell's frequent in-class use of gratuitous profanity and offensive language, however, Hardy's speech was germane to the subject matter of his lecture on the power and effect of language. The course was on interpersonal communications, and Hardy's speech was limited to an academic discussion of the words in question.

This case is similarly distinguishable from the facts in *Dambrot*, where the court held that the coach of a state university basketball team did not engage in protected speech when he used the word "nigger" during a locker-room peptalk. *See Dambrot*, 55 F.3d at 1187. The *Dambrot* court found it significant that "Dambrot's use of the N-word was intended to be motivational and was incidental to the message conveyed." *Id.* Dambrot's argument that his speech was protected by academic freedom was rejected because it failed to "advance[] an idea transcending personal interest or opinion which impacts our social and/or political lives." *Id.* at 1189. Unlike Dambrot's motivational use of the "N" word removed from any academic context, Hardy's in-class use of the objectionable word was germane to the subject matter of his lecture on the power and effect of language. Moreover, this and the other offensive words were suggested by the students in the context of the discussion, not gratuitously used by Hardy in an abusive manner.

Because the essence of a teacher's role is to prepare students for their place in society as responsible citizens, classroom instruction will often fall within the Supreme Court's broad conception of "public concern." *See* Gregory A. Clarick, Note, *Public School Teachers and the First Amendment: Protecting the Right to Teach*, 65 N.Y.U. L. Rev. 693, 702 (1990) (arguing that "[a] teacher's speech

both offers students ideas and arguments that may be very much a part of public debate and teaches students the process of rational discourse that allows them to participate meaningfully in public debate). Hardy's lecture on social deconstructivism and language, which explored the social and political impact of certain words, clearly meets this criterion. Although Hardy's in-class speech does not itself constitute pure public debate, it does relate to matters of overwhelming public concern -- race, gender, and power conflicts in our society. *See, e.g., Bonnell*, 241 F.3d at 816 (holding that "the subject of profane classroom language which precipitates a sexual harassment complaint lodged against the instructor . . . involves a matter of public import"); *Blum v. Schlegel*, 18 F.3d 1005, 1012 (2d Cir. 1994) (holding that a law school professor's "speech advocating the legalization of marijuana, criticizing national drug-control policy, and debating civil disobedience on its face implicates matters of public concern").

Hardy has thus satisfied the first prong of the two-part test set forth in *Pickering*. We therefore turn to the second prong, balancing Hardy's right to speak on a matter of public concern against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. Although the district court's order did not detail its analysis under the *Pickering* balancing test, it found no evidence that "Hardy's speech was having a negative impact upon [the school's interest in] efficiency."

Hardy claims that his right to free speech and academic freedom outweigh the College's pedagogical interests in restricting a teacher's in-class discussion. Green and Besser maintain that because Hardy's speech was "sexist and racially derogatory," it warranted no constitutional protection. In the alternative, they argue that the College's legitimate interests in avoiding the disruption caused by

Hardy's actions and the potential for further disruption as a result of Reverend Coleman's involvement, as well as the need to control course curriculum and the pedagogical methods of the College's instructors, should defeat Hardy's speech interests.

In balancing the competing interests involved, we must take into account the robust tradition of academic freedom in our nation's post-secondary schools. As the Supreme Court proclaimed more than thirty years ago:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.

Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (internal citations and quotation marks omitted). The Court has long recognized that educational institutions occupy a unique place in First Amendment jurisprudence. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (noting that "the unmistakable holding of this Court for almost 50 years" has been that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students"); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our society will stagnate and die.").

In light of these precedents, the argument that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction, is totally unpersuasive. *See Scallet v. Rosenblum*, 911 F.Supp.

999, 1013-14 (W.D. Va. 1996) ("To suggest that the First Amendment, as a matter of law, is never implicated when a professor speaks in class, is fantastic."). This circuit, following Supreme Court direction, has similarly held that a teacher's in-class speech deserves constitutional protection. *See Bonnell*, 241 F.3d at 823 (holding that "a professor's rights to academic freedom and freedom of expression are paramount in the academic setting"); *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 582 (6th Cir. 1976) (holding that the "First Amendment's protection of academic freedom" applies to teachers' in-class discussions).

We next focus on the College's interest in promoting efficiency in the educational services that it provides and in avoiding disruption to its operations. *Pickering* counsels that courts should consider whether an employee's comments meaningfully interfere with the performance of his duties or with the employer's general operations, undermine a legitimate goal or mission of the employer, create disharmony among coworkers, undercut an immediate supervisor's discipline over the employee, or destroy the relationship of loyalty and trust required of confidential employees. *See Pickering*, 391 U.S. at 569-70; *see also Williams v. Kentucky*, 24 F.3d 1526, 1536 (6th Cir. 1994) (denying the defendants' qualified immunity claims because "no reasonable official . . . could conclude that [the state's interest in preventing workplace disruption] outweighed Williams' interest in speaking freely on matters of political patronage and political corruption").

The discussion of the offensive words at issue was limited to a single lecture in Hardy's class. Despite the presence of nine African-Americans and one student of Asian descent, only one student objected. Hardy continued teaching his courses throughout the semester without any conflict, and all of his students but the one in question provided positive

feedback on his classroom instruction. There is no indication that the lecture undermined Hardy's working relationship within his department, interfered with his duties, or impaired discipline.

As noted earlier, the speech did have the effect of creating disharmony between Hardy and the College administrators, as evidenced by the contentious July 1998 meeting between Besser and Hardy and by the College's decision not to renew his contract. *Pickering* counsels, however, that a school's interest in limiting a teacher's speech is not great when those public statements "are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally." *Pickering*, 391 U.S. at 572-73.

Green and Besser, however, rely on *Hetrick v. Martin*, 480 F.2d 705 (6th Cir. 1973), to support their assertion that the College had an absolute right to evaluate Hardy's method of instruction. In *Hetrick*, this court found that no First Amendment interests were implicated when a state university did not renew the contract of a nontenured professor because her pedagogical style and teaching methods did not conform to the university's standards. *See id.* at 708. But *Hetrick* is easily distinguishable because the district court had made significant findings of fact related to the administration's dissatisfaction with Hetrick's teaching methods and ability. Numerous students had complained about "their inability to comprehend what she was attempting to teach them or what was expected of them." *Id.* at 706. Significantly, the court noted that had Hetrick been able to "adequately corroborate" her claim that the nonrenewal was based on statements made in class related to the Vietnam War and the military draft, relief might have been proper. *See id.* at 708.

As further justification for Hardy's termination, Green and Besser point to the potential disruption in school operations and enrollment that might have occurred had Reverend Coleman become more involved in the matter. The Supreme Court, however, in *Terminiello v. City of Chicago*, 337 U.S. 1 (1949), pronounced that a function of the First Amendment "is to invite dispute.... Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment." *Id.* at 4 (internal citation omitted).

Twenty years later, in *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 508-09 (1969), the Court echoed *Terminiello*'s rationale in rejecting a school district's argument that the wearing of black armbands by some of the students might provoke a disturbance. The Court stated:

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.... Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom -- this kind of openness -- that is the basis of our national strength and of the independence and vigor of Americans.

Id. at 508-09 (internal citation omitted).

The alleged circumstances surrounding Hardy's termination appear to present a classic illustration of "undifferentiated fear" of disturbance on the part of the College's academic administrators. Only after Reverend Coleman voiced his opposition to the classroom discussion did Green and

Besser become interested in the subject matter of Hardy's lecture. Just like the school officials in *Tinker*, Green and Besser were concerned with "avoid[ing] the discomfort and unpleasantness that always accompany" a controversial subject. *Id.* at 509. On balance, Hardy's rights to free speech and academic freedom outweigh the College's interest in limiting that speech. Hardy, therefore, has satisfied both prongs of the *Pickering* test in successfully alleging a First Amendment violation by a public employee.

2. Qualified immunity defense

Green and Besser next argue that they are entitled to qualified immunity because reasonable school officials could have disagreed about whether, and to what extent, Hardy's classroom speech was protected by the First Amendment. As discussed above, our review is limited to whether, in light of clearly established law, it was objectively reasonable for Green and Besser to believe that not renewing Hardy's contract in retaliation for his in-class speech was lawful. *See Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

There is no doubt that the right allegedly violated in this case, based on the freedom of speech protected by the First Amendment, is one of our most fundamental and established constitutional rights. For decades it has been clearly established that the First Amendment tolerates neither laws nor other means of coercion, persuasion, or intimidation "that cast a pall of orthodoxy" over the free exchange of ideas in the classroom. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *cf. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84 (1977); *Bd. of Regents v. Roth*, 408 U.S. 564, 574-75 (1972); *Perry v. Sindermann*, 408 U.S. 593, 596-98 (1972); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). Despite this overwhelming precedent, Green and Besser argue that the right was not clearly established because no court had specifically addressed

whether a public university could decline to renew a contract based solely on a professor's in-class use of "sexist and racially derogatory language."

Six years ago, however, this court in *Dambrot* held that "[t]he linchpin of the inquiry . . . for both public concern and academic freedom [is] the extent to which the speech advances an idea transcending personal interest or opinion which impacts our social and/or political lives." *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1189 (6th Cir. 1995). The court then cited with approval the Seventh Circuit's determination in *Swank v. Smart*, 898 F.2d 1247 (7th Cir. 1990), that "[t]he purpose of the free-speech clause . . . is to protect the market in ideas, broadly understood as the public expression of ideas, narratives, concepts, imagery, opinions--scientific, political, or aesthetic--to an audience whom the speaker seeks to inform, edify, or entertain." *Id.* at 1250-51 (internal citation and quotation marks omitted). Moreover, it is "the advancement of knowledge, the transformation of taste, political change, cultural expression, and the other objectives, values, and consequences of the speech that is protected by the First Amendment." *Id.* at 1251.

The *Dambrot* court then distinguished the coach's motivational use of the "N" word with the speech of two professors who had made racially derogatory remarks. Such speech by the professors, however repugnant, had as its purpose the influencing of public opinion and was therefore constitutionally protected. *See Dambrot*, 55 F.3d at 1189. Finally, the court emphasized that Dambrot's "position as coach is somewhat different from that of the average classroom teacher . . . whose primary role is to guide students through the discussion and debate of various viewpoints in a particular discipline." *Id.* at 1190. Given this court's indepth analysis of the protections available to one using the "N" word in an academic context, reasonable school officials should have known that such speech, when

it is germane to the classroom subject matter and advances an academic message, is protected by the First Amendment.

Green and Besser next claim that the district court erred when it failed to consider a "fact-specific approach" to the issue of whether they were entitled to qualified immunity. In support of this argument, they point to what would indeed amount to the College's legitimate pedagogical interests in controlling its course curriculum and evaluating the teaching methodology used in its classrooms. They fail to acknowledge, however, that whether these factors entered into their decision not to renew Hardy's contract remain in dispute. Hardy has alleged that it was purely his classroom speech that motivated the employment decision. Green and Besser are now attempting to transform these factual issues into the legal question of objective reasonableness. Due to the parties' competing versions of the facts, however, these are issues that must be considered by a factfinder when weighing the merits of Hardy's retaliation claim. As such, they are inappropriate for consideration on interlocutory appeal. *See Berryman v. Rieger*, 150 F.3d 561, 562 (6th Cir. 1998) (dismissing the appeal "because there is clearly a factual dispute at the heart of the qualified immunity issue").

Assuming that Green and Besser retaliated against Hardy based upon the content of his classroom discourse, such conduct was, as a matter of law, objectively unreasonable. Green and Besser, however, may defend against Hardy's claim by presenting proof that his contract was not renewed for permissible academic reasons, but that defense involves a disputed issue of material fact that cannot be resolved at this time.

IV. CONCLUSION

For all of the reasons set forth above, we **AFFIRM** the judgment of the district court and **REMAND** the case for further proceedings consistent with this opinion.

APPENDIX B

[Filed December 15, 1999]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:99CV-477-S

KENNETH E. HARDY,
Plaintiff,

v.

JEFFERSON COMMUNITY COLLEGE, et al
Defendants.

MEMORANDUM OPINION

This matter is before the Court on the Motion to Dismiss filed by the Defendants, Jefferson Community College, the University of Kentucky, Kentucky Community and Technical College System, (collectively, "JCC"), Richard Green, and Mary Pamela Besser. Defendants' motion asserts that the claims of the Plaintiff, Kenneth E. Hardy, should be dismissed on a number of grounds. Plaintiff filed a response, and Defendants filed their reply. Plaintiff has sought leave to file a Sur-Reply. An examination of Plaintiff's proposed Sur-Reply demonstrates that it raises nothing dispositive of the issues before this Court. Thus, for that reason, and to bring the pleadings on this motion to a close, the Motion for Leave to File a Sur-Reply will be denied.

Plaintiff had also filed a Motion to Strike material in some of Defendants' pleadings. This Court denied that motion by its Order of November 22, 1999. Plaintiff filed a Motion to Amend, Alter, or Vacate that ruling on the basis that it was not afforded sufficient time to file a reply. An examination of Plaintiff's proposed reply reveals nothing within it that would change this Court's decision. In addition, the core of the dispute in Plaintiff's motion concerns whether affidavits submitted by Plaintiff were properly obtained. None of the affidavits submitted by Plaintiff or Defendants will be considered by this Court in making its ruling upon the Motion to Dismiss. Accordingly, the Motion to Amend, Alter or Vacate will be denied.

FACTS

In considering Defendants' Motion to Dismiss, all factual allegations contained in Plaintiff's Complaint must be accepted as true. The motion should be denied unless it can be established beyond a doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief. *Thompson v. Superior Fireplace Co.*, 931 F.2d 372, 373 (6th Cir. 1991). Accordingly, the following facts are Plaintiff's version of the events that form that basis of his claims.

Defendant JCC hired Hardy in 1995 as an adjunct instructor in their communications program. Throughout subsequent years, JCC hired Hardy each semester on a continuous basis, with a separate contract for each semester. In May of 1998, Hardy was informed that he would teach three courses in the Fall 1998 semester, but did not at that time, or any time thereafter, sign a contract to teach for any semester after the Summer 1998 semester. During the Summer 1998 semester, Hardy taught Introduction to Interpersonal Communication. On July 16, during a lecture on language and social constructivism, the class discussed and analyzed various "socially controversial words,"

including the racial epithet, "nigger." One of the students, an African-American, complained about the use of some of these words, both to Hardy and to his superiors.

According to Hardy, Defendant JCC, Defendant Richard Green, President of JCC, and Defendant Mary Pamela Besser, Acting Dean of Academic Affairs for JCC, ultimately refused to renew Hardy's contract to teach in the Fall 1998 semester because of the use of the "socially controversial words," even though the use of the words was not directed at any individual but rather in a general academic discussion about their impact. Hardy furthermore alleges that this decision to not renew his contract came after the intervention of Rev. Louis Coleman, a local African-American political activist. Hardy alleges Coleman's involvement triggered fears that enrollment of African-Americans at JCC would decline if the dispute was not resolved to the satisfaction of the complaining student and Rev. Coleman.

DISCUSSION

In Count I of the Complaint, Hardy alleges that the nonrenewal of his contract violated his First Amendment, due process, and equal protection rights under federal law. In Count II, he alleges the Defendants conspired to do an unlawful act against him in violation of state law. Count III is a state law claim for defamation against Defendant Besser. Count IV is a state law claim against Defendants Besser and Green for tortious interference with Hardy's and JCC's continuing business relationship. Count V is a claim for breach of contract. Defendants have moved for dismissal of all claims on a variety of grounds.

Eleventh Amendment and Sovereign Immunity

Defendants' first defense is that Plaintiff's claims against JCC, as well as Green and Besser in their official capacity, are barred by the Eleventh Amendment and sovereign

immunity because Defendant JCC is an arm of the state of Kentucky. The Supreme Court has recently affirmed that the Eleventh Amendment prohibits suits in federal court by citizens against a state unless a) Congress has authorized a suit in the exercise of its power to enforce the Fourteenth Amendment, or b) a State has voluntarily waived its sovereign immunity and consented to suit. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2223 (1999). The immunity extends to state officials acting in their official capacity, except for claims for prospective injunctive relief. *Williams v. Kentucky*, 24 F.3d 1526, 1544 (6th Cir. 1994).

Plaintiff's federal claims are brought pursuant to 42 U.S.C. § 1983, and it is well-established that Congress did not abrogate state sovereign immunity in suits under that statute. *Quern v. Jordan*, 440 U.S. 332, 341 (1979). Nor does Plaintiff claim that the state of Kentucky has waived its sovereign immunity, established by Section 231 of the Kentucky Constitution, as to either Plaintiff's federal or state claims. Therefore, if JCC is an arm of the state of Kentucky, Plaintiff's claims against JCC and Besser and Green in their official capacity must be dismissed, with the exception of Plaintiff's claims under 42 U.S.C. § 1983 which request only prospective injunctive relief and not monetary damages.

In determining whether JCC is an arm of the state of Kentucky, and thus whether Eleventh Amendment immunity should apply, the most important factor is whether a judgment, if obtained, would be paid out of the state treasury. *Ritter v. University of Mich.*, 851 F.2d 846, 850 (6th Cir. 1988). The Court of Appeals for the Sixth Circuit has already determined that the University of Louisville and the University of Kentucky, two public postsecondary education systems within Kentucky, are arms of the state and are entitled to sovereign immunity. *Cowan v. University of*

Louisville, 900 F.2d 936 (6th Cir. 1990); *Hutsell v. Sayre*, 5 F.3d 996 (6th Cir. 1993). KRS 164.001(15) includes the Kentucky Community and Technical College System, of which JCC is a part, within the class of "postsecondary education systems." Defendants have not, however, presented any evidence that JCC is funded by the state of Kentucky, and thus a judgment against it would be paid out of the state treasury. Accordingly, the Motion to Dismiss Plaintiff's Complaint on the basis of the Eleventh Amendment and sovereign immunity will be deferred at this time. Plaintiff will be given an opportunity to supplement its motion with evidence sufficient to support a finding that Defendant JCC is entitled to Eleventh Amendment protection.

Qualified Immunity

Defendants Besser and Green assert that they are entitled to qualified immunity from Plaintiff's 42 U.S.C. § 1983 action. When a defendant raises qualified immunity, the Court must examine Plaintiff's Complaint to see if Plaintiff has alleged facts which would show that the conduct of the Defendants violated a clearly established constitutional right of which a reasonable person should have known. *Dominque v. Telb*, 831 F.2d 673, 677 (6th Cir. 1987).

In his Complaint, Plaintiff alleges that Defendants violated his right of free speech under the First Amendment, his right to due process, and his right to equal protection. Plaintiff does not allege any facts anywhere in his pleadings to support a claim for violation of his equal protection rights. Accordingly, Defendants' motion to dismiss Plaintiff's equal protection claim will be granted. However, Plaintiff has plead sufficient facts to support a claim that his free speech rights were violated, and that those rights were clearly established.

In his First Amendment claim, Plaintiff asserts that JCC terminated his employment because of a class in which Hardy led a discussion concerning "socially controversial words," including the racial epithet "nigger." Defendants assert that Hardy has no constitutional right to use such vulgarity in the classroom, and that Defendants had the right to terminate him for using such language.

It is clearly established that a government employee retains his First Amendment right to comment on matter of public concern, and his employer may not retaliate against him for exercise of that right. *Connick v. Myers*, 461 U.S. 138, 140 (1983). This includes untenured college professors whose contracts are not renewed, such as Hardy. *Perry v. Sindermann*, 408 U.S. 593 (1972). In determining whether speech is protected, the Court first determines whether the speech touches upon a matter of public concern. If it does, the employee's right to comment upon a matter of public concern is weighed against the interest of the State in promoting the efficiency of the services it provides through its employees. *Connick v. Myers*, 461 U.S. 138 (1983).

The Supreme Court has defined speech commenting on a matter of public concern as "relating to any matter of political, social, or other concern to the community." *Id.* at 146. Further, "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48. At this stage of the instant litigation, the Court does not have a record before it, but in ruling upon the motion to dismiss, we must assume the facts alleged by Hardy to be true.

Hardy alleges that the use of the racial epithet was in an academic context and setting and was done in order to analyze the impact of these words upon societal relations. We find that this use could touch upon a matter of public concern. Unlike the plaintiff in *Dambrot v. Central Michi-*

gan University, 55 F.3d 1177 (6th Cir. 1993), Hardy alleges that he was not directing the words at any of his students or that it was done merely to motivate them. Rather, Hardy alleges that his speech was a comment upon a matter of public concern, i.e. the impact of socially controversial words upon society. Hardy's right to free speech does have to be weighed against the school's interest in promoting the efficiency of its services, but at this stage of the litigation, the Court has no evidence before it that Hardy's speech was having a negative impact upon such efficiency.

Defendants also assert that Hardy's alleged constitutional rights were not clearly established because no binding precedent exists saying that a teacher has the right to use vulgarity in his teaching methods. However, the right of public employees to comment on matters of public concern has been clearly established by Supreme Court precedent for many years. A binding precedent with identical facts does not have to exist in order for a constitutional right to be clearly established. Accordingly, the Motion to Dismiss Plaintiff's First Amendment claims under 42 U.S.C. § 1983 against Defendants Besser and Green will be denied.

Plaintiff's due process claims, however, will be dismissed because Hardy did not have a property interest in his continued employment at JCC. JCC did not terminate Hardy, it chose not to renew his contract. Hardy has not alleged that he was entitled to any procedural due process prior to the nonrenewal of his contract. Whether his procedural due process rights were violated during the course of the last semester that he taught at JCC is irrelevant, as his employment for that semester was not terminated. Because Hardy has not alleged that the Defendants failed to follow any procedures that were necessary prior to nonrenewal of his contract, the Motion to Dismiss the procedural due process claim will be granted.

State Law Claims

Defendants have also moved for dismissal of Hardy's state law claims of conspiracy, defamation, tortious interference with a contractual relationship, and breach of contract. The Motion to Dismiss will be granted in part and denied in part as to the state law claims.

Defendants assert Hardy has not alleged any unlawful act as required to support a conspiracy claim. To the contrary, if it is shown that Defendants retaliated against Hardy for exercise of his constitutional rights, then that would satisfy the requirement of an unlawful act. Accordingly, the Motion to Dismiss the conspiracy claim will be denied.

Hardy's defamation claim fails to survive Defendants' Motion to Dismiss. Defendant Besser made the allegedly defamatory statements at a Council meeting, stating that the issue regarding Plaintiff had nothing to do with academic freedom, rather "other factors," and specifically, "legal issues" were involved. Hardy asserts that this intimated that he was "in some sort of legal trouble." The Court finds as a matter of law that no reasonable person could find the statements of Defendant Besser to be defamatory. Accordingly, the Motion to Dismiss Hardy's defamation claim will be granted.

Hardy's claim for tortious interference with a contractual relationship fails because Hardy had no contract with which to interfere. Defendants honored Hardy's contract to teach during the Summer Semester, 1998. Hardy had no contract to teach any subsequent semesters. Therefore, the Motion to Dismiss Hardy's claim for tortious interference with a contractual relationship will be granted.

If Defendants present evidence to this Court satisfying the burden of demonstrating that Defendant JCC is entitled to sovereign immunity, then Hardy's breach of contract claim must be dismissed. The state of Kentucky's limited waiver

of sovereign immunity allowing breach of contract claims to be brought in state court would not allow this Court to exercise jurisdiction over that claim on the basis of its supplemental jurisdiction under 28 U.S.C. § 1367.

CONCLUSION

Defendants' Motion to Dismiss will be granted in part and denied in part by separate order.

This 15th day of December, 1999.

/s/
CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record

APPENDIX C

[Filed December 15, 1999]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:99CV-477-S

KENNETH E. HARDY,
Plaintiff,

v.

JEFFERSON COMMUNITY COLLEGE, et al
Defendants.

ORDER

For the reasons set forth in the memorandum opinion entered this date and the court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED** that:

1. Defendants' Motion to Dismiss on the basis of sovereign immunity and the Eleventh Amendment is **DEFERRED** at this time. Defendants have 15 days from the date of this Order to supplement their motion only as to the issue of whether a judgment against Defendant JCC would be paid out of the state treasury.

2. Defendants' Motion to Dismiss as to Hardy's 42 U.S.C. § 1983 claim for violation of his First Amendment rights is **DENIED**.

3. Defendants' Motion to Dismiss as to Hardy's claims for violations of his procedural due process and equal protection rights is **GRANTED**.

4. Defendants' Motion to Dismiss as to Hardy's claims for conspiracy is **DENIED**.

5. Defendants' Motion to Dismiss as to Hardy's claims for defamation and tortious interference is **GRANTED**.

6. Defendants' Motion to Dismiss as to Hardy's claim for breach of contract is **DEFERRED**.

7. Plaintiff's Motions to File a Sur-Reply and to Amend, Alter or Vacate are **DENIED**.

IT IS SO ORDERED this 15th day of December, 1999.

/s/
CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record

APPENDIX D

[Filed January 26, 2000]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:99CV-477-S

KENNETH E. HARDY,
Plaintiff,

v.

JEFFERSON COMMUNITY COLLEGE, et al
Defendants.

MEMORANDUM OPINION

This matter is before the Court on Defendants' Motion to Alter or Amend, Defendants' Motion to Dismiss, and Defendants' renewed Motion to Stay Discovery. Defendants' Motion to Alter or Amend asks this Court to reconsider both our Order of December 15, 1999, granting in part, deferring in part, and denying in part Defendants' Motion to Dismiss and our Order of December 15, 1999, granting a stay of discovery with the exception of the deposition of Rev. Louis Coleman. Also before the Court is Defendants' Motion to Dismiss on the basis of sovereign immunity, which we deferred ruling upon in our Order of December 15, 1999.

In that Order, this Court gave the Defendants an opportunity to supplement their Motion to Dismiss with evidence sufficient to support a finding that a judgment against Defendant Jefferson Community College ("JCC") would be paid out of the state treasury. Defendants have presented evidence to this Court that, like other state institutions, any judgment against JCC would be paid with state funds. Furthermore, JCC falls under the same statutory scheme as the University of Louisville and the University of Kentucky. The Court of Appeals for the Sixth Circuit has already found that under Kentucky's statutory scheme, both the University of Louisville and the University of Kentucky are "arms of the state" and entitled to Eleventh Amendment protection. *Cowan v. University of Louisville*, 900 F.2d 936 (6th Cir. 1990); *Hutsell v. Sayre*, 5 F.3d 996 (6th Cir. 1993). We likewise find that Jefferson Community College is also an arm of the state. Therefore, all claims against JCC and Defendants Richard Green and Pamela Besser in their official capacity must be dismissed on the basis of Eleventh Amendment immunity, with the exception of those claims asking for prospective injunctive relief.

Motion to Alter or Amend

Defendants move to alter or amend those portions of the Orders of December 15, 1999, which denied qualified immunity to Defendants Green and Besser in their individual capacity and which permitted discovery to go forward as to Rev. Louis Coleman. For the same reasons we denied Defendants' Motion to Dismiss, we will deny Defendants' Motion to Alter or Amend as well.

Defendants acknowledge that Plaintiff has a constitutional right to free speech under the First Amendment. They assert, however, that Defendants Green and Besser are entitled to qualified immunity because the right to free speech *in the classroom setting* is not clearly established. We not only find this to be a distinction without a differ-

ence, but we also note that a university teacher has a constitutional right to academic freedom under the First Amendment. *See Healy v. James*, 408 U.S. 169 (1968). "[T]he purpose of academic freedom is to preserve the 'free marketplace of ideas' and protect the individual professor's classroom method from the arbitrary interference of university officials." *Parate v. Isibor*, 868 F.2d 821, 830 (6th Cir. 1989). The Supreme Court has long recognized that, "[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom." *Healy v. James*, 408 U.S. 169, 180-181 (1968) (citing *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

Thus, Plaintiff has properly alleged that his employment as a teacher at Defendant JCC ended because of his exercise of his constitutional rights, specifically, his rights to free speech and academic freedom. Whether the facts of the case will support those allegations remains to be seen, but at this stage of the litigation, Defendants have not demonstrated that they are entitled to qualified immunity as a matter of law.

Defendants have also asked this Court to reconsider its denial of the Motion to Dismiss Plaintiff's conspiracy claims, on the basis that Defendants did not violate Plaintiff's constitutional rights. As we have not dismissed Plaintiff's First Amendment claims, the Motion to Alter or Amend the denial of Defendants' Motion to Dismiss Plaintiff's conspiracy claims will be denied as well.

Discovery

Defendants again ask this Court to stay all discovery in this case on the basis that the issue of qualified immunity is still pending. We have now resolved the issue of Defendants' qualified immunity, both on the Motion to Dismiss

and the Motion to Alter or Amend. There being no further reason for delay at this time, the partial stay of discovery will be lifted, and all discovery may proceed in this case, including the deposition of Rev. Louis Coleman.

This 26th day of January, 2000.

/s/
CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record

APPENDIX E

[Filed January 26, 2000]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:99CV-477-S

KENNETH E. HARDY,
Plaintiff,

v.

JEFFERSON COMMUNITY COLLEGE, et al
Defendants.

ORDER

For the reasons set forth in the memorandum opinion entered this date and the court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED** that the Motion to Dismiss the Defendant Jefferson Community College and the Defendants Green and Besser in their official capacity is **GRANTED**, with the exception of Plaintiff's claims for prospective injunctive relief. The Motion to Alter or Amend and the Motion to Stay Discovery made by the Defendants is **DENIED**. All discovery may proceed at this time.

IT IS SO ORDERED this 26th day of January, 2000.

/s/
CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record

APPENDIX F

[Filed February 1, 2000]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:99CV-477-S

KENNETH E. HARDY,
Plaintiff,

v.

JEFFERSON COMMUNITY COLLEGE, et al
Defendants.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the Motions to Reconsider this Court's Order of December 15, 1999, made by the Plaintiff, Kenneth E. Hardy. Hardy's first Motion to Reconsider (Docket #33) requests that this Court lift its partial stay of discovery. As this Court has already done so in its Order of January 26, 2000, **IT IS HEREBY ORDERED AND ADJUDGED** that this Motion to Reconsider is **DENIED** as moot. In his second Motion to Reconsider (Docket #34), Hardy requests that this Court reconsider the portions of its Memorandum Opinion and Order that:

1. held that Hardy was not terminated;

2. dismissed Hardy's claim for violation of his due process rights;

3. dismissed Hardy's claim for tortious interference with a contractual relationship.

It is undisputed by the parties that the written contract between Hardy and Defendant Jefferson Community College was honored by the college. Hardy completed teaching his class in the summer semester, 1998, and was paid accordingly. It is also undisputed that Hardy never had a written contract to teach in any subsequent semester. Hardy asserts, however, that he had an oral contract to teach in the fall semester, and this is the basis for his motion to reconsider.

This Court has already determined that Defendant Jefferson Community College is an arm of the state of Kentucky, and that the Eleventh Amendment prohibits a suit against a state by one of its citizens unless it has waived its sovereign immunity. The state of Kentucky has waived its sovereign immunity only for *written* contracts. KRS 45A.245(1). An oral contract with the state of Kentucky is void because it is against public policy, *All-American Movers v. Kentucky ex rel. Hancock*, 552 S.W.2d 679, 681 (Ky. Ct. App. 1977), and "a void transaction has no legal force or effect." *Noble v. National Mines Corp.*, 774 F.2d 144, 147 (1985). Hardy cannot base his claims upon an oral contract which has no legal force or effect.

Furthermore, Kentucky courts have not recognized a cause of action for tortious interference against a defendant for interfering with its own contractual relationship. *CMI, Inc. v. Toximeters*, 918 F. Supp. 1068 (W.D. Ky 1995). Because President Green and Dean Besser are agents of Jefferson Community College, Plaintiff's cause of action alleges that Jefferson Community College interfered with its

own contractual relationship. As no Kentucky court has recognized this tort, we decline to do so as well.

For all of the above reasons, **IT IS HEREBY ORDERED AND ADJUDGED** that the Motion to Reconsider (Docket #34) is **DENIED**.

IT IS SO ORDERED this 1st day of February, 2000.

/s/
CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record

APPENDIX G

[Filed October 4, 2001]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 00-5198

KENNETH E. HARDY,
Plaintiff-Appellee,

v.

JEFFERSON COMMUNITY COLLEGE, ET AL.,
Defendants,

MARY PAMELA BESSER, ET AL.,
Defendants-Appellants.

ORDER

BEFORE: KEITH, NORRIS, and GILMAN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were

fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/

Leonard Green, Clerk

(2)

Supreme Court, U.S.
FILED
MAR 1

No. 01-936

IN THE

Supreme Court of the United States

MARY PAMELA BESSER and RICHARD GREEN,

Petitioners,

v.

KENNETH E. HARDY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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INTRODUCTION

From 1995 through 1998, Kenneth Hardy taught in the communications department at Jefferson Community College ("JCC"), a public college in Louisville, Kentucky. Hardy was an adjunct instructor, and his contract thus ran semester to semester. Petition, Appendix A at 2a. Student evaluations revealed that he was an excellent professor, and he was highly regarded within the institution. *Id.* at 3a. In the spring of 1998, JCC assured Hardy that, in addition to his Summer Term courses, he would again teach three courses in the upcoming fall. *Id.* During the Summer Term, however, came the controversy that underlies this litigation.

Hardy taught a summer class entitled "Introduction to Interpersonal Communication," and devoted one class period to social deconstructivism, specifically to an examination of terms commonly used to oppress or marginalize individuals and social groups. *Id.* Hardy asked class members to recommend terms for discussion, and many responded. Some of the words proposed and discussed included "girl," "lady," "faggot," "nigger," and "bitch." Pet. App. A at 3a. A stimulating and academically productive discussion of these words ensued.

While a large majority of Hardy's twenty-two students found the discussion to be a valuable educational and philosophical experience, one student categorically opposed any in-class use of the terms "nigger" or "bitch," and voiced her objection to Hardy. Sensitive to this student's concerns, Hardy gave her the option to avoid further discomfort by foregoing the remainder of the discussion without academic penalty.

She dismissed this proposal as unsatisfactory, and instead took her complaint both to Richard Green, the college's President, and to Reverend Louis Coleman, a prominent civil rights activist in the Louisville community. *Id.* at 3a-4a. Reverend Coleman met with Green, and requested that JCC take action to address and correct Hardy's alleged transgression. Separately, Hardy met with Mary Pamela Besser, Acting Dean of his department, who advised him that a prominent citizen had become involved in the controversy. *Id.* at 4a. On August 23, 1998, JCC advised Hardy – ambiguously, in retrospect – that the parties had reached a satisfactory resolution of their dispute. *Id.* Hardy apparently was not among the parties contemplated by this statement, as JCC did not invite him to teach again in the Fall Term, nor has it invited him back since. JCC claims there were simply no classes for Hardy to teach, and has never suggested that Hardy violated any of its academic policies or mandates.

In July, 1999, Hardy filed a complaint, alleging both state and federal causes of action, and naming as defendants JCC, the Kentucky Community and Technical College System, and Besser and Green individually. The current dispute centers on allegations that Besser and Green, by retaliating against Hardy for exercising his rights of free speech and academic freedom, deprived him of his First and Fourteenth Amendment rights, in violation of 42 U.S.C. § 1983.

Besser and Green have moved to dismiss, contending that Hardy's academic treatment of offensive words merits no protection under the First Amendment. Alternatively, they assert qualified immunity, on the grounds that any rights Hardy may have are not so clearly established that reasonable people in their positions would have known of them. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

The District Court rejected both of these claims. Pet. App. B at 21a. Citing this Court's ruling in *Connick v. Myers*, 461 U.S. 138, 140 (1983), the Court noted that individuals do not, by accepting government employment, surrender their right to speak freely on matters of public concern. *Id.* at 26a. The District Court found that Hardy had cleared the preliminary hurdle of showing that the classroom discussion implicated matters of public concern, based on the as-yet-uncontradicted allegations of his Complaint. *Id.* The Court distinguished *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1993), in which a college basketball coach used the term "nigger" as part of an exhortation to his players during a halftime speech – a context plainly devoid of academic significance. *Id.* at 27a.

While the District Court did not cite this Court's ruling in *Pickering v. Board of Education*, 391 U.S. 563 (1968), it implicitly acknowledged the standard set forth there, noting that Hardy's free speech interests would ultimately need "to be weighed against the school's interests in promoting the efficiency of its services." Pet. App. B at 27a. Because the matter appeared on a motion to dismiss, however, there was no evidence to demonstrate that Hardy's speech had any adverse effect on the school's ability to meet its legitimate goals. The District Court acknowledged that JCC might ultimately prevail on a balancing test, but concluded that any such victory would be won in the procedural future.[1]

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1. Ultimately, Petitioners may also prevail on other grounds as well, such as by showing that Hardy's contract would not have been renewed irrespective of his protected speech. *See e.g., Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 416-17 (1979); *Mt. Healthy Board of Education v. Doyle*, 429 U.S. 274, 287 (1977). The current procedural posture, however, makes any such argument premature.

Finally, the court rejected JCC's contention that Hardy's First Amendment rights were not so clearly established that reasonable officials would have known their violation to be proscribed. *See Harlow*, 457 U.S. at 818 (1982). The court acknowledged that no precedent existed applying facts identical to those at bar, but rejected this as the test. Pet. App. B at 27a. Instead, the court framed the operative question as whether a public employee has a clearly established constitutional right to speak on matters of public concern. *Id.* Answering in the affirmative, and finding that reasonable officials would know of this right, the District Court denied qualified immunity.

Besser and Green appealed the denial of qualified immunity to the Sixth Circuit. The Sixth Circuit, citing *Mitchell v. Forsyth*, 472 U.S. 511, 528 n.9 (1985), took pains to note that its jurisdiction over the otherwise interlocutory order "is confined to the 'purely legal' question of 'whether the facts alleged . . . support a claim of violation of clearly established law." Pet. App. A at 7a. Its inquiry limited to the facts Hardy pled, the Sixth Circuit properly disregarded Petitioners' attempt to dismiss this case as "nothing more than an internal employment dispute." Pet. App. A at 8a.[2]

Citing *Connick*, the court noted that the threshold inquiry is whether a given statement touches on matters of public concern. *Id.* at 10a. This preliminary question must be answered by reference to the "content, form, and context

2. Although Petitioners now acknowledge that the denial of qualified immunity is reviewed only on pure legal grounds, they nevertheless repeatedly represent that Hardy's speech was contrary to JCC's pedagogical mission and contrary to Hardy's own classroom policies, and that JCC furthered legitimate purposes by terminating him. These purported facts lie clearly outside the record.

of a given statement, as revealed by the whole record." *Id.*, *citing Connick*, 461 U.S. at 147-48. Applying this test to the facts pled, the court held that Hardy's discussion implicated matters of public concern, because it was "germane to the subject matter of his lecture on the power and effect of language," and was "limited to an academic discussion of the words in question." Pet. App. A at 11a. The court distinguished *Dambrot, supra*, where the ostensible point of the coach's speech had been to motivate basketball players.

While finding that Hardy's classroom discussion of offensive words fell short of "pure public debate," the Sixth Circuit held, "it does relate to matters of overwhelming public concern – race, gender, and power conflicts in our society." *Id.* at 12a. This hurdle overcome, the Sixth Circuit then applied the familiar *Pickering* balancing test. In response to JCC's argument that Hardy's discussion would disturb its function, the Sixth Circuit cited this Court's observation in *Tinker v. Des Moines Indep. School District*, 393 U.S. 503, 508-09 (1969), that:

> Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance.

Observing that JCC's concerns about the negative impact of the controversy were precisely the type of "undifferentiated fear" frowned upon by *Tinker*, and specifically noting that the school did not object until Reverend Coleman had intervened, the Sixth Circuit concluded that the balance tipped strongly in Hardy's favor. Pet. App. A at 16a. It therefore affirmed the District Court's denial of qualified immunity.

In their Petition for a Writ of Certiorari, Besser and Green make an even more expansive argument than the one they presented to the Sixth Circuit. They now suggest that Hardy's discussion, simply because it took place in the classroom, enjoys no First Amendment protection. In support of their claims, Petitioners cite cases from the Third, Fourth, and Fifth Circuit, cases it contends are irreconcilable with the Sixth Circuit holding in this case. As discussed below, none of the cases on which Petitioners rely supports the sweeping proposition that professors have no First Amendment rights in the classroom. Instead, every circuit adopts this Court's mandate in *Connick*, and examines the substance of the speech in question.

REASONS FOR DENYING THE WRIT

I. THE CIRCUIT COURTS UNIFORMLY RECOGNIZE THAT PUBLIC EMPLOYEES MAY ENJOY FIRST AMENDMENT PROTECTIONS IN THE WORKPLACE

The Sixth Circuit balked at Petitioners' suggestion that educators in public employ check their First Amendment rights at the schoolhouse door:

> [T]he argument that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction, is totally unpersuasive. [Pet. App. A at 13a].

Petitioners nevertheless reiterate the argument here, and assert that cases from the Third, Fourth, and Fifth Circuits "as a threshold matter preclude First Amendment protection

for teacher speech that is spoken as part of the teacher's job." Petition, at 14. The cases on which Petitioners rely probe the admittedly unsettled boundaries of academic freedom, but none advocates the radical notion that the First Amendment never protects classroom speech.

Petitioners place their firmest reliance upon the Fourth Circuit case of *Urofsky v. Gilmore*, 216 F.3d 401 (2000), *cert. denied*, 531 U.S. 1070 (2001). There, the *en banc* court upheld the constitutionality of a Virginia statute restricting public employees from accessing sexually explicit materials on computers owned or leased by the state. The statute included a protocol by which an employee could seek a variance, by applying to the state officials, demonstrating that the sexually explicit materials were relevant to a *bona fide* research project or undertaking, and securing prior approval. *Id.* at 405. Neither Urofsky nor his colleagues sought any such variances; instead, the professors challenged the law on its face. *Id.* at 405-06.

Upholding the statute's constitutionality, the court recognized the undisputable fact that a state "undoubtedly possesses greater authority to restrict the speech of its employees than it has as sovereign to restrict the speech of the citizenry as a whole." *Id.* at 406. To illustrate this point, the court borrowed this Court's analogy from *Connick*, noting that a state can surely prohibit an assistant district attorney from publicly undermining her supervisor's authority. *Id.* at 407-08. Even speech that might merit the state's vigilant protection on a public street need not be tolerated in a government office. By the same token, if a state does not wish to fund or enable internet access to sexually explicit materials – at least without a prior finding that the materials have legitimate academic value – this too is a content choice within its discretion.

Urofsky is not inconsistent with the instant case, most obviously because no speech was ever suppressed under the Virginia statute. The Fourth Circuit expressly recognized that a constitutional question might arise if any of the professors were denied access to materials that they felt were important to their academic work. 216 F.3d at 415, n.17.[3] The issue of the constitutional implications of suppressing academic speech – the very issue presented by JCC's retaliation against Kenneth Hardy – was simply not before the Fourth Circuit in *Urofsky*.

Prior Fourth Circuit cases confirm the *Urofsky* court's recognition that classroom speech may have constitutional implications. In cases where educators have suffered retaliation for their speech, the Fourth Circuit has applied the same scrutiny exacted by the Sixth Circuit on Ken Hardy's classroom discussion. In *Stroman v. Colleton County Sch. Dist.*, 981 F.2d 152 (4th Cir. 1992), the plaintiff, a South Carolina teacher, was terminated after circulating a letter to

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3. There appears to be a division among the circuits as to whether speech by educators receives greater protection than speech by other public employees. *Urofsky* traces the development of the doctrine of "academic freedom," from its roots in German universities, to its incorporation in the standards of the American Association of University Professors. 216 F.3d at 409-15. Ultimately, the Fourth Circuit concludes that because "academic freedom" is an educational construct, and not a legal one, teachers are on the same First Amendment footing as other public employees. *But see Blum v. Schlegel*, 18 F.3d 1005, 1011 (2d Cir. 1994) (holding that law professor's speech merited added protections based on the context – a law school class – which the court believed should be a forum for debate). Petitioners extend the Fourth Circuit's holding beyond a rejection of educators' *additional* First Amendment rights to mean a rejection of *any* First Amendment rights. This exceeds the Fourth Circuit's holding, and defies logic.

his colleagues, asking that they protest the school board's budget policies by taking part in an orchestrated "sick-out," in which all faculty would claim to be ill during exam week. *Id.* at 154.

The Fourth Circuit examined the content of Stroman's missive and found that, although it consisted primarily of his personal grievances, it also expressed concerns about budget management and other potentially meaningful fiscal issues confronting the school district. *Id.* at 158. The court held that because Stroman's "speech arguably relates to a matter of public concern" it was proper to weigh that interest against the school board's countervailing interest in the effective operation of its schools. *Id.* The court ultimately found that the school board's interests – having professors around to proctor exams, and being free from disloyal or subversive employees – were superior to Stroman's interests in airing his dirty fiscal laundry.[4] 981 F.2d at 159. Although its conclusion vindicated the school district, the Fourth Circuit's probing factual inquiry, guided by this Court's holdings in *Pickering* and *Connick*, belies Petitioners' argument that teachers abandon their First Amendment rights when they enter their workplace. *See also Hall v. Marion Sch. Dist. No. 2*, 31 F.3d 183 (4th Cir. 1994) (affirming judgment for teacher fired after she complained about excessive spending of taxpayer money for lavish conferences/ vacations).

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4. The Fourth Circuit also considered the fact that Stroman's epistle called for his colleagues to make false claims of illness – a patently dishonest practice. Here, of course, there is no allegation that Ken Hardy did anything improper, let alone suborn acts of disloyalty.

Petitioners are also in error when they claim that the Fifth Circuit denies constitutional protection to classroom speech. Their reliance on *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794 (5th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990), is particularly misplaced, since that case turned on a specific finding that no controversial speech was suppressed. Kirkland was a high school teacher who disregarded the approved supplemental reading list for his world history class, instead compiling a list of his own chosen readings. *Id.* at 796. None of the readings he chose was controversial; indeed, most were approved for other disciplines, and all were available in the school's library. *Id.* In unilaterally amending the reading list, Kirkland also ignored an accepted procedure that would have involved public meetings with teachers and parents to discuss the propriety of the additions. *Id.* at 800. Only after he was penalized for deviating from the approved list did he allege First Amendment violations, among other causes of action. *Id.* at 800.

The Fifth Circuit found that Kirkland's selection of the added books was not an issue of public concern, and that his case was merely one of an insubordinate employee attempting to transform a private employment dispute into a censorship claim. 890 F.2d at 800. The court emphasized that Kirkland did not allege that the school had ever censored any expression; instead it had made the eminently logical decision that *The Great Gatsby* and other canonical literary works had more merit in its English department than in Kirkland's history class. *See id* at 796 n.3. The Fifth Circuit clarified the fact-specific nature of its holding:

> Our decision should not be misconstrued as suggesting that a teacher's creativity is

> incompatible with the first amendment, nor is it intended to suggest that public school teachers foster free debate in their classrooms only at their own risk or that their classrooms must be "cast with a pall of orthodoxy." We hold only that public school teachers are not free, under the first amendment, to arrogate control of curricula.

Id. at 801-02; quoting in part *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). The court did not dismiss the possible constitutional implications of censorship, holding only that "Kirkland's conduct in disregarding Northside's administrative process does not constitute protected speech." *Id.* at 802.

Other Fifth Circuit precedent makes clear that classroom speech is not categorically denied First Amendment protection. In *Martin v. Parrish*, 805 F.2d 583 (5th Cir. 1986), the Fifth Circuit conducted the same *Connick*-based inquiry employed by the Sixth Circuit here. Martin, an economics professor, routinely degraded his students' attitudes toward the class, and toward economics as a discipline, often colorfully analogizing those attitudes to the solid waste of certain male bovines. *Id.* at 584. The Fifth Circuit did not focus exclusively on the venue of the speech – the factor Petitioner would hold to be dispositive. Instead, the court evaluated Martin's speech based on the complete record, finding his vulgar language unprotected by the First Amendment "because, taken in context, it constituted a deliberate, superfluous attack on a 'captive audience' with no academic purpose or justification." *Id.* at 586.

If Martin's speech had been outside the ambit of the First Amendment simply because it took place in his classroom, then the Fifth Circuit's examination of its academic relevance would have been superfluous. The fact that the court subjected the speech to a critical analysis shows that its distinction between "employee speech" and "citizen speech" requires something far more nuanced than the simple scope-of-employment test Petitioners now advocate. *See also Kennedy v. Tangipahoa Parish Library Bd. of Control*, 224 F.3d 359, 366 (5th Cir. 2000) (discussing the "citizen-employee" distinction recognized by *Connick*, and holding that speech may raise issue of public concern even where employee is motivated partly by personal interest); *Tompkins v. Vickers*, 26 F.3d 603, 607 (5th Cir. 1994) (dismissing as unpersuasive school administrator's claim that, because complaining teacher stood to benefit from continued funding of art program, his criticism of its closure was not public speech); *Kingsville Independent School Dist. v. Cooper*, 611 F.2d 1109, 1113 (5th Cir. 1980) (unambiguously holding that "classroom discussion is protected activity").

The Third Circuit – the final circuit court that Petitioners place on their side of the purported divide – also recognizes that professors have First Amendment rights, even where their speech relates to their employment. *Johnson v. Lincoln University*, 776 F.2d 443 (3d Cir. 1985); *see also Trotman v. Board of Trustees of Lincoln University*, 635 F.2d 216 (3d Cir. 1980), *cert. denied*, 451 U.S. 986 (1981). Dr. William Johnson was the Chairman of Lincoln University's Chemistry department and was, like Ken Hardy, a distinguished member of his college's faculty. *Johnson*, 776 F.2d at 447. A series of bitter internal disputes led to Johnson's firing, and he alleged that the termination was retaliation for his protected speech.

Applying the then-recent *Connick* standard, the Third Circuit vacated the district court's grant of summary judgment in favor of the university. Faulting the lower court for its casual dismissal of Johnson's allegations of grade inflation and other academic irregularities as merely an "outgrowth of his personal dispute," the court cautioned:

> If, in fact, the employee's speech is largely composed of matters of only personal concern, that becomes relevant when the balancing is done, not in the determination whether the speech touches on a matter of public concern. The court, then, cannot make a superficial characterization of the speech or activity taken as a whole; to do so would undermine the entire purpose of the *Pickering* test. Instead, it must conduct a particularized examination of each activity for which the protection of the First Amendment is claimed.

Id. at 451. The Third Circuit ultimately concluded that Johnson's complaints implicated matters of public concern, notwithstanding the fact that they were also the product of a decidedly disgruntled employee.

Contrary to Petitioners' assertions, there is no division among the circuits on the threshold question of whether classroom speech merits First Amendment protection. Extensive precedent from the Third, Fourth, and Fifth Circuits reflects the same careful consideration of context engaged in by the Sixth Circuit in this case, and in *Dambrot*. The "content, form, and context" inquiry mandated by *Connick* requires courts to answer the substantive threshold question of whether employee speech raises viable issues of public concern. *See also Swank v. Smart*, 898 F.2d 1247, 1251

(7th Cir. 1990), *cert. denied*, 498 U.S. 853 (1990) (wherein Judge Posner dismisses public employee social banter as "too remote from . . . familiar emporia of the marketplace of ideas to activate the guarantees of the First Amendment"). The linguistic and sociological impact of language, the subject of Ken Hardy's classroom discussion, is a core issue of public concern, and cannot be dismissed by any reasonable person as mere "chit-chat." *See id.*

II. THIS COURT'S PRIOR DECISIONS IN PICKERING AND CONNICK MAKE THIS CASE A POOR CANDIDATE FOR PLENARY REVIEW

Petitioners argue that a grant of certiorari will allow the Court to establish a uniform standard for judicial review of cases involving speech by public employees. While the constitutional magnitude of this issue is undeniably great, Petitioners fail to understand that this Court has confronted the issue many times before, and has made the considered decision not to establish a bright-line test, instead preferring a case-specific and fact-specific approach. This Court's opinion in *Pickering*, by requiring courts to balance the substantive interests of the individual against those of the state institution, acknowledged that uniformity was impracticable in an area where so many different factual scenarios can arise.

The *Connick* decision, demanding judicial inquiry into the content, form, and context of public employee speech, again unambiguously declined to reduce this vital constitutional question to a facile formula.[5] The fact-specific

5. While *Connick* also clarified the importance of an employee's personal stake in the subject speech, this factor does not enter the calculus here because, as noted above, Ken Hardy advanced no extracurricular agenda by conducting his classroom discussion.

nature of the judicial inquiry mandated by these cases limits the precedential value of any case decided in this area.

This Court's resolution of the current dispute would not, as Petitioners suggest, provide uniformity in the nation's First Amendment public speech jurisprudence; this Court has already concluded that uniformity in this area is pragmatically unattainable. Instead, this Court would only answer the question of whether a college may lawfully terminate a professor for conducting an academic examination of the word "nigger" where the classroom discussion: violated no established school policy; had no adverse effect on the school's academic mission; did not stray beyond the bounds of academic propriety; and, caused the college to retaliate only as a gesture of appeasement to a community activist who threatened to cause public outcry if the professor were not let go. Posited in such a factually ponderous manner, this question admittedly remains an immensely interesting one, but it does not merit this Court's attention, as it is highly unlikely to arise again.

CONCLUSION

For the reasons discussed above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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(3)

No. 01-936

IN THE

Supreme Court of the United States

MARY PAMELA BESSER AND
RICHARD GREEN,

Petitioners,

v.

KENNETH E. HARDY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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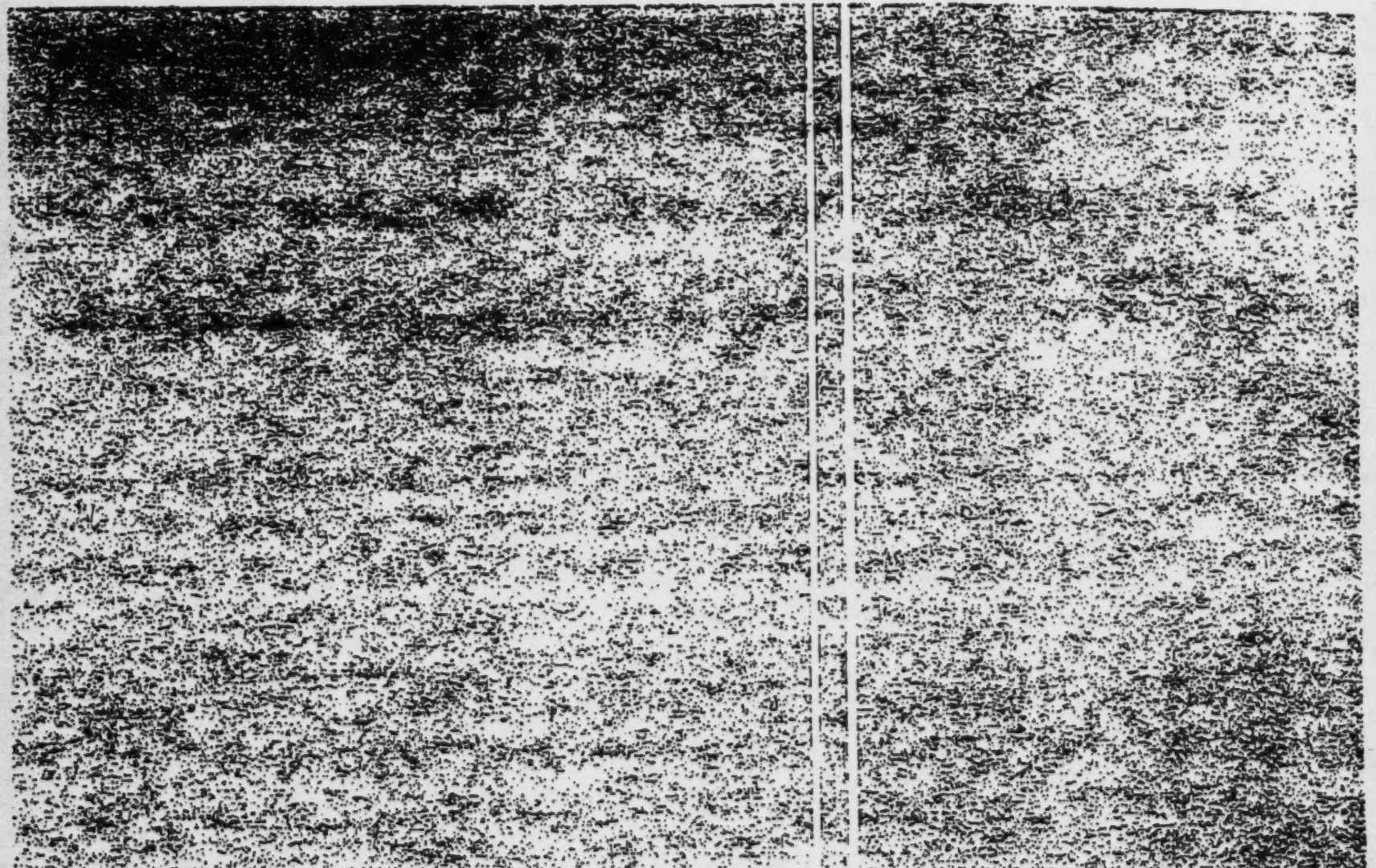


TABLE OF AUTHORITIES

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Cases:

Boring v. *Buncombe County Bd. of Educ.*, 136 F.3d 364 (4th Cir.), *cert. denied*, 525 U.S. 813 (1998) 4, 6, 7, 8

Bradley v. *Pittsburgh Bd. of Educ.*, 910 F.2d 1172 (3d Cir. 1990) 4

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California Teachers Ass'n v. *State Bd. of Educ.*, 271 F.3d 1141 (9th Cir. 2001) 9

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Connick v. *Myers*, 461 U.S. 138 (1983) ..... *passim*

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Hazelwood Sch. Dist. v. *Kuhlmeier*, 484 U.S. 260 (1988) 2

Johnson v. *Lincoln Univ.*, 776 F.2d 443 (3d Cir. 1985) 5

Kennedy v. *Tangipahoa Parish Library Bd. of Control*, 224 F.3d 359 (5th Cir. 2000) 5

Kirkland v. *Northside Indep. Sch. Dist.*, 890 F.2d 794 (5th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990) 6, 7, 8

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Cases:

Pickering v. *Board of Educ.*, 391 U.S. 563 (1968) ..... *passim*

Rosenberger v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) 3

Stroman v. *Colleton County Sch. Dist.*, 981 F.2d 152 (4th Cir. 1992) 5

Terrell v. *University of Tex. Sys. Police*, 792 F.2d 1360 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987) 7

Tompkins v. *Vickers*, 26 F.3d 603 (5th Cir. 1994) 5

Trotman v. *Board of Trustees of Lincoln Univ.*, 635 F.2d 216 (3d Cir. 1980), *cert. denied*, 451 U.S. 986 (1981) 5

Urofsky v. *Gilmore*, 216 F.3d 401 (4th Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001) 3, 5, 6, 9

Constitutional Provisions:

U.S. Const. amend. I ..... *passim*

Other Authorities:

Karen C. Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J.L. & Educ. 1 (2001) 9

Rachel E. Fugate, Comment, *Choppy Waters Are Forecast for Academic Free Speech*, 26 Fla. St. U. L. Rev. 187 (1998) 9

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IN THE

Supreme Court of the United States

No. 01-936

MARY PAMELA BESSER AND
RICHARD GREEN,

Petitioners,

v.

KENNETH E. HARDY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONERS

1. Respondent Kenneth Hardy's opposition brief offers considerable support for the petition for certiorari. Hardy concedes that the boundaries of academic freedom for publicly employed teachers are "unsettled." Opp. 7. He admits that the circuits are divided on the level of protection afforded to speech by educators as compared to other public employees. *Id.* at 8 n.3. And he agrees that the "constitutional magnitude" of the issue before this Court is "undeniably great." *Id.* at 14.

Even more telling is what his brief does not do. Hardy does not dispute our contention that the state courts are divided on the Question Presented. Pet. 19-20. Nor does he address the extensive academic commentary detailing the

conflict in the lower courts on whether and to what extent a teacher's classroom speech receives constitutional protection. *Id.* at 18-19. Hardy likewise does not contest that the circuit courts are divided on which of this Court's First Amendment precedents applies to questions of teacher speech, with some courts applying the analysis of *Hazelwood School District* v. *Kuhlmeier*, 484 U.S. 260 (1988), and others the balancing test set forth in *Pickering* v. *Board of Education*, 391 U.S. 563 (1968) and *Connick* v. *Myers*, 461 U.S. 138 (1983). More importantly, he lets pass without comment our demonstration that the courts that apply *Hazelwood* to the Question Presented conflict with the approach of the Sixth Circuit below. Pet. 15-16. Finally, and most revealingly, Hardy never disputes that the Sixth Circuit itself expressly acknowledges a circuit conflict on the very proposition on which petitioners seek certiorari. *See Cockrel* v. *Shelby County Sch. Dist.*, 270 F.3d 1036, 1051 (6th Cir. 2001).

Having conceded so much, Hardy attempts to redefine the issues before this Court in an effort to manufacture common ground among the circuits. These efforts cannot withstand scrutiny.

2. Because the Question Presented reveals an unmistakable circuit split, respondent ignores it altogether. Hardy asserts that we argue that "teachers abandon their First Amendment rights when they enter their workplace." Opp. 9. Unsurprisingly, this assertion and others like it are without citation to the petition for certiorari, for they grossly mischaracterize our position. The issue is not whether teachers ever enjoy First Amendment protections while on school grounds; they assuredly do.[1] The question is whether "First Amendment

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[1] Indeed, courts accord differing levels of protection to teacher speech on school grounds based on whether instructors are acting as teachers at the time. *See, e.g., California Teachers Ass'n* v. *Governing Bd. of San Diego Unified Sch. Dist.*, 53 Cal. Rptr. 2d 474, 479-481 (Ct. App. 1996) (school board could restrict wearing

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protection extends to a state college instructor's *classroom speech when the instructor is speaking as an employee* of the college." Pet. i (emphasis added). On this point, the decision below flatly contradicts decisions from the Third, Fourth, and Fifth Circuits.

In fact, Hardy's own analysis reveals the fault line dividing the courts of appeals. In setting forth the procedural history, Hardy focuses—as we did—upon the Sixth Circuit's conclusion that his use of offensive words implicated matters of public concern precisely *because* that speech was "germane to the subject matter of his lecture on the power and effect of language" and "limited to an academic discussion of the words in question." Opp. 5 (citing Pet. App. 11a). In short, he agrees with us that the Sixth Circuit extended First Amendment protection to his classroom speech because he spoke in his role as a state-employed teacher.

This is the nub of the circuit conflict. As explained in the petition, the Third, Fourth, and Fifth Circuits take a contrary approach. These courts conclude that classroom speech like Hardy's is ineligible for the *Pickering/Connick* balancing test because such speech is delivered by the teacher as an employee. *See* Pet. 10-13 (collecting and discussing cases); *Urofsky* v. *Gilmore*, 216 F.3d 401, 407 (4th Cir. 2000) (en banc) (explaining that in considering whether employee speech merits First Amendment protection, "the [Supreme] Court has emphasized the *unrelatedness* of the speech at issue to the speaker's employment duties") (emphasis added), *cert. denied*, 531 U.S. 1070 (2001). The Third, Fourth, and Fifth Circuits thus echo this Court's explanation in *Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. 819, 833 (1995), that "[w]hen the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate

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of political buttons while employees are engaged in curricular activities, but could not enforce rule in noninstructional settings).

the content of what is or is not expressed when it is the speaker." By contrast, the Sixth Circuit accords the greatest individual First Amendment protection to precisely that sort of speech, bestowing on individual teachers a First Amendment right to determine the content of curricula notwithstanding a school's contrary educational objectives.

3. While conceding that the boundaries of academic freedom are "admittedly unsettled," Hardy asserts that no case "advocates the radical notion that the First Amendment never protects classroom speech." Opp. 7. Of course, numerous courts have denied First Amendment protection to classroom speech by publicly employed teachers when they speak on behalf of their employers. The Third Circuit, for example, expressly holds that "[a]lthough a teacher's *out-of-class* conduct, including her advocacy of particular teaching methods is protected, * * * her *in-class* conduct is not." *Bradley* v. *Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990) (emphases added).[2]

Hardy makes no effort to distinguish this holding. Indeed he never even mentions either *Bradley* or *Edwards* v. *California University of Pennsylvania*, 156 F.3d 488 (3d Cir. 1998), *cert. denied*, 525 U.S. 1143 (1999), which rules to the same effect. Instead, Hardy looks for circuit uniformity in unrelated cases. These precedents do not address whether a

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[2] Hardy attempts to confuse the issue by speaking in absolutes. He employs the term "classroom speech" in its broadest connotation to encompass any utterance within the four walls of a classroom. This case is not about *any* utterance within a classroom confines, but rather about the degree of control the state may exercise over pedagogical speech by its employees. *See Boring* v. *Buncombe County Bd. of Educ.*, 136 F.3d 364, 373 (4th Cir.) (en banc) (Luttig, J., concurring) ("In the * * * context of teacher in-class noncurricular speech, the teacher assuredly enjoys some First Amendment protection. In the * * * context of teacher in-class curricular speech, the teacher equally assuredly does not."), *cert. denied*, 525 U.S. 813 (1998).

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publicly employed teacher's classroom speech receives First Amendment protection, but rather the uncontroversial—and uncontested—proposition that employment-related matters are not automatically excluded from First Amendment analysis. Opp. 12-13 (discussing *Johnson* v. *Lincoln Univ.*, 776 F.2d 443 (3d Cir. 1985); *Trotman* v. *Board of Trustees of Lincoln Univ.*, 635 F.2d 216 (3d Cir. 1980), *cert. denied*, 451 U.S. 986 (1981)). The same error plagues Hardy's attempt to explain away the Sixth Circuit's clear conflict with the Fourth and Fifth Circuits. Opp. 8-9 (discussing *Stroman* v. *Colleton County Sch. Dist.*, 981 F.2d 152 (4th Cir. 1992); *Hall* v. *Marion Sch. Dist. No. 2*, 31 F.3d 183 (4th Cir. 1994)), *id.* at 12 (discussing *Kennedy* v. *Tangipahoa Parish Library Bd. of Control*, 224 F.3d 359 (5th Cir. 2000); *Tompkins* v. *Vickers*, 26 F.3d 603 (5th Cir. 1994)). None of these cases addresses the unique issues at play when a teacher appears as the school's representative in a classroom setting.

4. Hardy's efforts to distinguish the holdings of the Fourth and Fifth Circuits are unconvincing. He contends that the Fourth Circuit's holding in *Urofsky* v. *Gilmore* is somehow consistent with the ruling below because *Urofsky* involved a facial challenge. Opp. 7-8. This fact had no bearing on the Fourth Circuit's holding, which was that speech made by a public employee in his capacity as an employee speaking for the government merits no First Amendment protection regardless of the importance of the issues involved. 216 F.3d at 407.

Indeed, Hardy acknowledges that *Urofsky* affords public employers the right to make content choices. Opp. 7. Yet, he makes no effort to explain why the alleged retaliation for his pedagogical use of offensive language is not a similarly valid content choice. Instead, he claims that the issue of "suppressing academic speech" was not before the Fourth Circuit, *id.* at 8, a claim wholly at odds with *Urofsky*'s result, which rejected a challenge by professors to restrictions on speech undertaken in their capacity as employees. The rule

adopted by the Fourth Circuit—excluding employee speech on employment-related matters from First Amendment protection—sweeps broadly to encompass academic and non-academic speech alike, for the court held that state-employed professors enjoy no rights beyond those shared by all public employees. *Urofsky*, 216 F.3d at 415.[3] In any case, the Fourth Circuit has likewise explicitly denied First Amendment protection to teachers for disputes over curricular matters in another case that Hardy's opposition ignores. *See Boring* v. *Buncombe County Bd. of Educ.*, 136 F.3d at 369; Pet. 11.

Nor can Hardy persuasively distinguish the Fifth Circuit's ruling in *Kirkland* v. *Northside Independent School District*. Though he makes much of the fact that *Kirkland* based its rejection of the teacher's First Amendment claim on a variety of factors, he does not address the court's point that the key question in determining whether a teacher's speech touches on a matter of public concern is whether the teacher speaks "in his *role as a citizen* and not in his *role as an employee* of the school district." 890 F.2d 794, 798-799 (5th Cir. 1989) (emphases in original), *cert. denied*, 496 U.S. 926 (1990). The question of the capacity in which a teacher is speaking is always central to the analysis.[4]

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[3] Hardy attaches considerable weight to the Fourth Circuit's tepid reservation of the question whether the refusal to permit particular research projects might ever raise constitutional issues. Opp. 8 (citing *Urofsky*, 216 F.3d at 415 n.17). This reservation, of course, does not affect the court's holding that professors who speak in their capacity as employees do not touch on matters of public concern for purposes of the *Pickering/Connick* framework. Indeed, the footnote gives no hint what these hypothetical constitutional issues may be.

[4] Curiously, Hardy sees the *Kirkland* court's statement that "[w]e hold only that public school teachers are not free, under the first amendment, to arrogate control of the curricula," 890 F.2d at 802, as somehow vindicating his position. In this case, of course,

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Nor is *Kirkland* an aberration; it is rooted in prior Fifth Circuit precedent holding that the role in which a public employee speaks determines whether the speech touches on a matter of public concern sufficient to trigger the *Pickering/Connick* balancing test. *Terrell* v. *Univ. of Tex. Sys. Police*, 792 F.2d 1360, 1362 (5th Cir. 1986) ("our task is to decide whether the speech at issue in a particular case was made primarily in the plaintiff's role as citizen or primarily in his role as employee"), *cert. denied*, 479 U.S. 1064 (1987); *Kirkland*, 890 F.2d at 798-799 (citing *Terrell*).

Indeed, the Sixth Circuit itself acknowledges what Hardy denies. In *Cockrel* v. *Shelby County School District*, the court explicitly took issue with the Fourth and Fifth Circuits' treatment of a teacher's classroom speech in holding that a teacher's in-class speech on controversial subjects can touch on a public concern:

> We believe that the Fourth and Fifth Circuits have extended the holding of *Connick* beyond what the Supreme Court intended. Under the courts' analyses in *Boring* and *Kirkland*, a teacher, regardless of what he decides to include in his curriculum, is speaking as an employee on a private matter. ***This essentially gives a teacher no right to freedom of speech when teaching students in a classroom, for the very act of teaching is what the employee is paid to do.*** * * * In [plaintiff's] case, although she was speaking in her role as an employee when presenting information on the environmental benefits of industrial hemp, the content of her speech * * * most certainly involved matters related to the political and social concern

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Hardy's challenged speech was entirely curricular in nature. By ruling that Hardy's pedagogical use of offensive language could not be the basis for h[illegible] termination, the Sixth Circuit ruled that teachers have some co[illegible]rol over the curriculum that is shielded from administrative scrutiny. The case on petition thus directly conflicts with *Kirkland*.

> of the community, as opposed to mere matters of private interest. Thus, *contrary to the analyses in Boring and Kirkland*, we hold that [plaintiff's] speech does touch on matters of public concern. [*Cockrel*, 270 F.3d at 1051-52 (emphases added) (citations omitted).]

Hardy makes no effort to confront this analysis by the very court of appeals he seeks to defend. Nor, for that matter, does he address our contention that the same division of authority plaguing the courts of appeals likewise pervades the state courts. Pet. 19-20.

5. Hardy concedes that a circuit split exists on the scope of constitutional protection for academic freedom. He agrees that the "boundaries" of the concept as a constitutional matter are "admittedly unsettled," and that there "appears to be a division among the circuits" on the matter. Opp. 7, 8 n.3. This is no tangential concession, for the notion of an *individual* right to academic freedom lies at the very heart of the Sixth Circuit's opinion.

Hardy himself suggests the centrality of academic freedom to the ruling below by commencing his argument with a quote from the Sixth Circuit's analysis of this Court's academic freedom precedents. Opp. 6. When read without his editing, the passage reveals that the notion of academic freedom was critical to Hardy's victory before the court of appeals. "*In light of these precedents*, the argument that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction, is totally unpersuasive." Pet. App. 13a (emphasis added); *see also id.* ("In balancing the competing interests involved, we must take into account the robust tradition of academic freedom in our nation's post-secondary schools.").

This outcome is simply impossible in those courts of appeals that do not recognize academic freedom as an individual right. Pet. 17 (collecting cases). As discussed in the petition, the conflict between the Sixth and Fourth Circuits

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on this point is especially stark. While the Sixth Circuit examined this Court's academic freedom precedents and concluded that they trump an institution's interest in controlling the in-class pedagogical speech of its employees, the *Urofsky* court examined the same precedents and reached precisely the opposite conclusion. "The Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an *institutional* right of self-governance in academic affairs." *Urofsky*, 216 F.3d at 412 (emphasis added). The sharp conflict among the circuits on the extent to which there is an individual right to academic freedom supports granting the petition.

6. Hardy contends that this Court has "confronted the issue many times before, and has made the considered decision not to establish a bright-line test, instead preferring a case-specific and fact-specific approach." Opp. 14. This argument fails for two reasons.

First, it is premised on Hardy's misreading of the Question Presented to be about establishing uniform rules for all public employees. *Id.* As discussed above, this case is about the First Amendment protection afforded to a teacher's curricular speech made in his capacity as a state employee, an issue that this Court has never clearly settled. *See, e.g.*, *California Teachers Ass'n* v. *State Bd. of Educ.*, 271 F.3d 1141, 1148-49 & n.6 (9th Cir. 2001) ("Neither this court nor the Supreme Court has definitively resolved whether and to what extent a teacher's instructional speech is protected by the First Amendment."); Karen C. Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J.L. & Educ. 1, 6 (2001) ("The Supreme Court has yet to squarely address what level of protection, if any, should be accorded to teachers' in-class speech."); Rachel E. Fugate, Comment, *Choppy Waters Are Forecast for Academic Free Speech*, 26 Fla. St. U. L. Rev. 187, 203 (1998) ("the Supreme Court has not addressed the level of protection that such speech demands"). Hardy offers no authority to the contrary.

Second, Hardy's claim that a "bright-line" rule contradicts *Connick* and *Pickering* is an argument on the merits, not a basis for denying certiorari. As discussed above and in the petition, the division among the circuits is based on contrary readings of what this Court's cases require. Only this Court can resolve that conflict.

At the moment, the rule applied to the Question Presented varies from circuit to circuit. The time is right for this Court to resolve the deepening confusion in the lower courts.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition should be granted.

Respectfully submitted,

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